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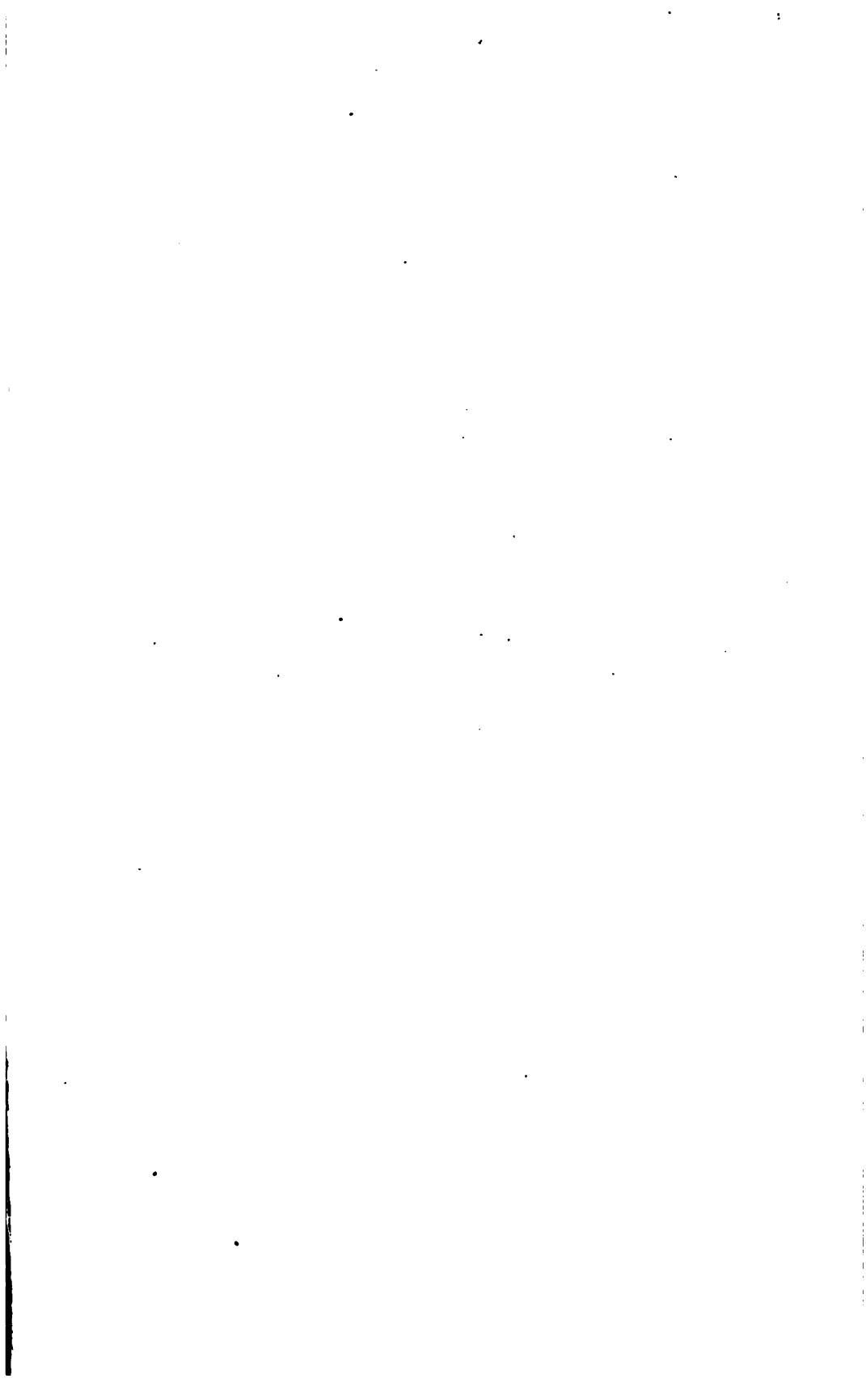




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NEW  
REPORTS  
OF  
Cases  
HEARD IN  
THE HOUSE OF LORDS,  
ON  
APPEALS AND WRITS OF ERROR;  
AND DECIDED  
DURING THE SESSION  
1835.

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By RICHARD BLIGH, Esq.  
BARRISTER AT LAW.

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VOL. IX.

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# REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS,

UPON APPEALS AND WRITS OF ERROR,

*And decided during the Session 1834,*

4th & 5th W. IV.

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ENGLAND.

(COURT OF CHANCERY.)

JOHN BUSH, and ANN his Wife, } *Appellants ;*  
and ROBERT MATTOCK - - }

SUSANNAH LOCKE - - - *Respondent.*

By articles of agreement, on the 24th of April, 1769, reciting that R. M. was seised of customary lands of inheritance of the manor of Taunton Deane, &c.—in consideration of an intended marriage, and of the marriage fortune or portion of G. H. &c., R. M. covenanted and agreed that he, his heirs or assigns, should and would surrender to the use of J. H. and J. M., their heirs, &c. the premises therein recited, to be held by them, J. H. and J. M., and the survivor, &c. “ Upon trust to permit R. M., his heirs and assigns, to hold the premises, &c. until the marriage; and after the marriage, for R. M. for his life: and after the death of R. M. upon trust for G. H. for her life, if she should survive R. M.: and after the death of the survivor of the settlor and his intended wife, that the trustees should surrender the premises to the use of such child or children of the marriage as the settlor should appoint by deed or

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“ will; and in default of appointment by the settlor, then  
 “ as G. H. should by deed or will appoint; and in default  
 “ of such appointment by R. M. and G. H., then to the  
 “ use of all and every the child and children of the body of  
 “ R. M., on the body of G. H. begotten (if more than one  
 “ child), their heirs and assigns for ever, according to the  
 “ custom of the manor, as tenants in common; and if but  
 “ one such child, then to the use and behoof of such only  
 “ child, his or her heirs or assigns for ever, according to the  
 “ custom of the said manor; such surrender or surrenders  
 “ of the premises to be made at the costs and charges in all  
 “ things, of such child or children who should be entitled to  
 “ take the same by virtue of the limitation: and in default  
 “ of issue of the body of R. M., &c. that should be living  
 “ at the time of the death of the survivor of them: then  
 “ upon this further condition, and upon this further special  
 “ trust and confidence, that J. H. and J. M., or the survivor  
 “ of them and his heirs or assigns, should surrender into  
 “ the hands of the lord of the manor for the time being, all  
 “ and singular the premises, to the use and behoof of the  
 “ *right heirs of R. M. for ever, according to the custom of*  
 “ *the manor of Taunton Deane*; such surrender or sur-  
 “ renders to be made at the costs and charges, in all things,  
 “ of such person or persons who by virtue of the last-men-  
 “ tioned condition or limitation should be entitled to take  
 “ the same.”

The articles were executed and surrenders made according to the agreement, &c.

There was issue of the marriage one child only, E. M. The settlor R. M. died in 1779. By his will reciting that he had surrendered and settled the greatest part of his Taunton Deane lands, to the use of his wife for life, and that he had other lands parcel of the manor of Taunton Deane which were not settled, in order to make some provision for his daughter, he had surrendered his Taunton Deane lands to J. H. upon trust, to perform his will, he devised to J. H., “ all his Taunton Deane lands (not settled on his marriage as aforesaid), to hold according to to the custom of the manor, upon trust to sell such unsettled lands, and with the purchase monies and his personal estate, to pay debts &c., and apply the overplus for the maintenance, &c. of his daughter, &c., and when she attained the age of 21, to pay the overplus of the trust monies to his daughter for her own use.

G. his widow held the premises until the time of her death in

1819. E. M. died in 1812, having by her will devised all her lands, &c. to J. H.

R. M. had no brother who survived him.

Held upon these facts and events that, S. L. the youngest sister of R. M. who, at the time of the death of G. the widow, was heiress of R. M. according to the custom of the manor, was entitled to the customary premises, under the trusts of the articles of agreement.

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**ROBERT MARKE**, formerly of Pitminster, in the county of Somerset, deceased (the brother of the Respondent), was in and before the year 1769 seised or entitled to him and his heirs, of or to certain customary or copyhold estates, held of the manor of Taunton Deane, in the county of Somerset.

In the year 1769, Robert Marke intermarried with Grace Haddon.

Previously to the marriage, articles of agreement, dated the 24th of April, 1769, were duly made and executed between the said Robert Marke, of the first part; the said Grace Haddon, and John Haddon and John Marke, of the third part; whereby it was recited, that a marriage was agreed upon and soon intended to be had and solemnized by and between the said Robert Marke and Grace Haddon; and that the said Robert Marke was and stood lawfully and absolutely seised to him, his heirs and assigns for ever, according to the custom of the manor of Taunton Deane, in the said county of Somerset, of and in all that one messuage, and one half yard land of bond-land in the tithing of Pitminster, one other messuage, and one half yard land of bond-land in the said tithing of Pitminster, one

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messuage, and one farthingland of bond-land, in the tithing of Corffe; four acres and a half of meadow of overland, called Half-yard Mead, and six acres of land of overland, called Half-yard Land, in the tithing of Pitminster; two acres of land of overland, called Hockey Mead, and one messuage, and one farthingland of bond-land in the tithing of Pitminster, and one messuage and one farthingland of bond-land in the tithing of Pitminster; all which said messuages, lands, tenements, and premises were situate, lying, and being within the parishes of Pitminster and Corffe, or one of them, in the said county of Somerset, and were parcels of the customary lands of inheritance of Taunton Deane aforesaid, and were late the lands of Robert Marke the father, deceased. And in consideration of the said intended marriage, and of the marriage fortune or portion of her the said Grace Haddon, and for surrendering, conveying, settling, and assuring the said messuages, tenements, lands, and premises unto and upon the trusts, uses, ends, intents and purposes thereinafter limited, expressed and declared of and concerning the same, it was concluded and mutually agreed upon by and between the said parties, and the said Robert Marke, party thereto, for himself, his heirs, executors and administrators and for every of them, did covenant, promise, grant and agree to and with the said John Haddon and John Marke, their heirs and assigns, that he the said Robert Marke, party thereto, his heirs or assigns, should and would at his and their own proper costs and charges, before the solemnization of the said intended marriage, surrender or other-

wise well and sufficiently convey and assure, according to the custom of the said manor of Taunton Deane, unto and upon, or to the use and behoof of the said John Haddon and John Marke, or their heirs and assigns for ever, according to the custom of the same manor, the said messuages, tenements, lands, and all and singular other the premises therein-before particularly mentioned and recited, with their respective appurtenances, to be by them, the said John Haddon and John Marke, and the survivor of them, and the heirs and assigns of such survivor, held and enjoyed upon the several trusts and conditions, and to and for the several uses, ends, intents and purposes, and under and subject to the several limitations, powers, authorities, provisoes, and agreements therein-after declared, mentioned, and expressed of and concerning the same, and to and for none other use, trust, end, intent, or purpose whatsoever (that is to say), “ upon trust, “ nevertheless to permit and suffer the said Robert “ Marke, party hereto, his heirs and assigns to hold “ and enjoy all and singular the said messuages, tenements, lands, and premises, with their respective appurtenances, and receive and take the rents, issues, and profits thereof, until the solemnization of the said intended marriage, and from and after the solemnization thereof, upon trust, that they the said John Haddon and John Marke and the survivor of them, his heirs and assigns, shall permit and suffer him the said Robert Marke, party hereto, and his assigns, to hold and enjoy all and singular the said several messuages, tenements, lands and premises, with their respective appurtenances, and the rents, issues, and profits

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“ thereof, to receive and take to his and their own  
“ use and benefit, for and during the term of his  
“ natural life, he rendering therefore all rents, re-  
“ parations, suits, and services due and payable,  
“ and to grow due in respect of the premises afore-  
“ said, during the said term: And further, upon  
“ trust, that from and immediately after the death  
“ of him, the said Robert Marke, party hereto,  
“ they the said John Haddon and John Marke,  
“ and the survivor of them, his heirs or assigns,  
“ shall and will permit and suffer her the said  
“ Grace Haddon, and her assigns, to hold and enjoy  
“ all and singular the said messuages, tenements,  
“ lands and premises, with their respective ap-  
“ purtenances, and the rents, issues, and profits  
“ thereof, to have, receive, and take to her and  
“ their own use and benefit, for and during the  
“ term of her natural life, for the better support  
“ and maintenance of her the said Grace, in case  
“ she survives her said intended husband, and in  
“ full recompense and lieu of all dower and thirds,  
“ which she may, can, or might otherwise have  
“ claim or challenge in, or out of all or any the  
“ freehold lands, tenements, or hereditaments of  
“ the said Robert Marke, party hereto, she ren-  
“ dering therefore all rents, reparations, suits and  
“ services due and payable, and to grow due in  
“ respect of the premises aforesaid, during the said  
“ term. And upon this further special trust and  
“ confidence, that upon and after the several  
“ deaths of them, the said Robert Marke and  
“ Grace Haddon, and after the death of the sur-  
“ vivor of them, they the said John Haddon and  
“ John Marke, or the survivor of them, and his  
“ heirs or assigns, shall surrender into the hands

“ of the lord of the manor aforesaid, for the time  
 “ being, all and singular the several messuages,  
 “ lands, tenements and premises aforesaid, to the  
 “ use and behoof of such child or children of the  
 “ body of the said Robert Marke, party hereto, on  
 “ the body of the said Grace Haddon lawfully be-  
 “ gotten, for such estate or estates, and in such  
 “ manner, form and proportion, and charged or  
 “ not charged with the payment thereof of such  
 “ sum or sums of money unto all, any, or either  
 “ of the child or children of the body of the said  
 “ Robert Marke, party hereto, on the body of the  
 “ said Grace Haddon, lawfully to be begotten, and  
 “ in such manner as the said Robert Marke, party  
 “ hereto, by any his deed or deeds in writing  
 “ under his hand and seal, to be duly executed in  
 “ the presence of and attested by two or more  
 “ credible witnesses (with or without power of  
 “ revocation in such deed or deeds to be contained),  
 “ or by his last will and testament, in writing, to  
 “ be duly executed and published, in the presence  
 “ of, and attested by three credible witnesses, shall  
 “ give, devise, order, limit, direct or appoint. And  
 “ in default of such gift, devise, order, limitation,  
 “ direction, or appointment by him, the said Ro-  
 “ bert Marke, party hereto, then upon trust, that  
 “ they the said John Haddon, and John Marke,  
 “ or the survivor of them, and his heirs and  
 “ assigns, shall surrender into the hands of the  
 “ lord of the manor for the time being, all and  
 “ singular the messuages, tenements, lands and  
 “ premises aforesaid, to the use and behoof of such  
 “ child or children of the body of the said Robert  
 “ Marke, party hereto, on the body of the said

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“ Grace Haddon lawfully to be begotten, for such  
“ estate or estates, and in such manner, form and  
“ proportion, and charged (or not charged) with  
“ the payment thereof of such sum or sums of  
“ money unto all, any, or either other the child  
“ or children of the said Robert Marke, party  
“ hereto, on the body of the said Grace Haddon  
“ lawfully to be begotten, and in such manner as  
“ the said Grace Haddon, by any her deed or  
“ deeds in writing, under her hand and seal to be  
“ duly executed, in the presence of and attested  
“ by two or more credible witnesses, with or with-  
“ out power of revocation in such deed or deeds to  
“ be contained, or by her last will and testament  
“ in writing, to be duly executed and published,  
“ in the presence of and attested by three credible  
“ witnesses, shall give, devise, limit, direct or ap-  
“ point. And in default of such gift, devise, order,  
“ limitation, direction or appointment by both of  
“ them, the said Robert Marke and Grace Haddon,  
“ then to the use and behoof of all and every the  
“ child and children of the body of the said Ro-  
“ bert Marke, party hereto, on the body of the  
“ said Grace Haddon lawfully begotten (if more  
“ than one child), their heirs and assigns for ever,  
“ according to the custom of the manor aforesaid,  
“ as tenants in common; and if but one such child,  
“ then to the use and behoof of such only child,  
“ his or her heirs and assigns for ever, according  
“ to the custom of the said manor, such surrender  
“ or surrenders of the said premises to be made at  
“ the costs and charges, in all things, of such child  
“ or children who shall be entitled to take the  
“ same by virtue hereof. And in default of issue  
“ of the body of the said Robert Marke, party

" hereto, on the body of the said Grace Haddon  
 " lawfully to be begotten, that shall be living at  
 " the time of the death of the survivor of them,  
 " the said Robert Marke, party hereto, and Grace  
 " Haddon, then upon this further condition, and  
 " upon this further special trust and confidence,  
 " that they, the said John Haddon and John  
 " Marke, or the survivor of them, and his heirs or  
 " assigns, shall surrender into the hands of the lord  
 " of the manor aforesaid for the time being, all and  
 " singular the said several messuages, tenements,  
 " lands and premises, with their respective appur-  
 " tenances, to the use and behoof of the right  
 " heirs of the said Robert Marke, party hereto, for  
 " ever, according to the custom of the said manor  
 " of Taunton Deane; such surrender or sur-  
 " renders last mentioned to be made at the costs  
 " and charges, in all things, of such person or  
 " persons who by virtue of the last-mentioned  
 " condition or limitation shall be entitled to take  
 " the same."

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The estates comprised in the articles of agreement were duly surrendered to the trustees, John Haddon and John Marke, and they were admitted.

There was issue of the marriage of Robert Marke and Grace Haddon one child only, named Elizabeth Marke.

Robert Marke died in the year 1779, leaving his widow Grace Marke (formerly Grace Haddon) and his daughter Elizabeth Marke surviving. Elizabeth Marke died in the year 1812, without having been married. The widow Grace Marke died in the year 1819.

Robert Marke had no other issue; and at the time of the death of Grace Marke, the Respondent, as

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his youngest sister was, according to the custom of the manor of Taunton Deane, the heiress of Robert Marke.

By some mesne surrenders the legal estate in the premises comprised in the articles of agreement (with the exception of a small part) became vested in Thomas Southwood, who was also the lord of the manor, and he had some time before the filing of the bill entered into possession.

On the 13th of May, 1825, the Respondent filed her bill in the Court of Chancery against Thomas Southwood. The bill set forth shortly the above-mentioned articles of agreement, stating that they were in the possession of the defendant, and that the Respondent was unable to set them forth with certainty. It then stated the surrender to the trustees, and that they were admitted to the premises to hold the same to them and their heirs and assigns for ever, according to the custom of the manor, upon the trusts expressed and declared in the articles of agreement.

The bill further stated, that the marriage of Robert Marke and Grace Haddon was duly had and solemnized shortly after the date and execution of the articles of agreement; and that there was issue of the marriage one daughter, Elizabeth Marke only, and that Robert Marke held and enjoyed the customary premises during his life, and that he died in or about the year 1779, intestate as to the said customary premises, and that after his death Grace Marke his widow held and enjoyed the premises, pursuant to the articles of agreement, until her death.

The bill then stated, that Elizabeth Marke died in or about the year 1812 without having had issue,

and without having been married, and that Grace, the widow of Robert Marke, departed this life in or about the year 1819.

The bill further stated that, Robert Marke had no issue save as aforesaid, and that he had left no brother him surviving, and that the Respondent was his youngest sister; and that the Respondent as such youngest sister became and was at the time of the death of Grace Marke, and was then the heiress of Robert Marke, according to the custom of the manor of Taunton Deane, and that the Respondent as such customary heiress, upon the death of Grace Marke, became entitled to the said customary messuages or tenements, farms and lands, under and by virtue of the trusts of the said articles of agreement.

The bill then stated, that in or about the year 1810 the said John Haddon and John Marke surrendered the said customary premises into the hands of the lord of the manor, to the use of some other persons, who were thereupon admitted to the same, subject to the trusts of the said articles of agreement, and that by some other surrenders and admittances, or other assurances, the particulars of which the Respondent was unable to discover, and, lastly, by some surrender made to, and to the use of the Defendant Thomas Southwood, who was the lord of the manor, the legal estate in the said premises became and was vested in him the said Thomas Southwood, subject to the trusts of the said articles of agreement, and that he had ever since the death of the said Grace Marke been in the possession of the same, or in the receipt of the rents and profits thereof.

The bill charged that, at and previous to the

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time when the said customary premises were surrendered or assured to the Defendant, he was well aware of and had notice of the said articles of agreement, and of the trusts thereof, and that the said articles of agreement, or some memorandum thereof or relating thereto, were or was entered upon the court rolls of the said manor; and that the same were recited or referred to in the several instruments under which the Defendant claimed; and that the Defendant took some bond or covenant by way of indemnity against any claims to be made by the Respondent, or any other person entitled under the said articles of agreement, and that the several persons through or under whom the said Defendant claimed, respectively had notice of the said articles of agreement, at and previous to the times when the said premises were surrendered or assured to them respectively; and that under the circumstances aforesaid the Defendant became and was a trustee of the legal estate, of and in the customary premises, upon and subject to the trusts of the said articles of agreement.

The bill prayed that, it might be declared that the Respondent was in equity entitled to the said customary premises, and that the Defendant might be decreed to grant, surrender, or otherwise assure the same, to her and her heirs and assigns, and to admit her to the same; and that an account might be taken of the rents and profits of the said premises possessed or received by the Defendant, or for his use or by his order, since the death of Grace Marke, and that he might be decreed to pay to the Respondent what should be found due from him on taking such account; and to deliver up to her

the copies of court roll and other instruments and writings relating to the said customary premises ; and for a receiver.

The Defendant Thomas Southwood by his answer, admitted the seisin of Robert Marke ; the articles, the surrender, the marriage, and that there was issue of the marriage only one daughter, and that Robert Marke held the premises until his death in 1779.

He then stated that he believed that Robert Marke was seized of other customary lands and hereditaments held of the manor of Taunton Deane, besides the messuages, &c. comprised in the articles ; and that Robert Marke in his life time made and published his last will and testament in writing, bearing date the 24th of October, 1779, and which was duly executed and attested as by law required for devising lands of inheritance, as the Defendant believed, and that thereby after reciting that previous to his marriage with his wife Grace he surrendered and settled the greatest part of his Taunton Deane lands unto or to the use of his said wife, for her life ; and having other lands, parcel of the manor of Taunton Deane, which were not settled, in order to make some provision for Betty his daughter and only child (meaning the said Elizabeth Marke), he had then surrendered his Taunton Deane lands to his father-in-law John Haddon, upon trust to perform and fulfil his will ; he did thereby give and devise unto the said John Haddon all his Taunton Deane lands whatsoever and wheresoever (not settled on his marriage as aforesaid), with the appurtenances, to hold to the said John Haddon, his heirs and assigns for ever, according to the custom of the

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manor; upon trust, that John Haddon or his heirs should, if he or they should think fit or necessary, sell and dispose of such unsettled lands, and with the monies arising thereby, and by the sale of his personal estate, pay off and discharge all his just debts and funeral expenses, and from and after the payment thereof, upon trust, that John Haddon, his heirs, executors, or administrators, should apply the overplus of such monies in the maintenance, education, and placing out of his said daughter Betty, in such manner as he or they should, in his or their discretion, think fit, until she attained the age of twenty-one years, and when and as she attained the age of twenty-one years, upon trust, to pay such overplus money, if any unexpended in the trusts aforesaid, unto his said daughter Betty, to and for her own use and benefit.

As to the allegation in the bill that Robert Marke died intestate as to the customary premises, the Defendant submitted that if Robert Marke took any estate or interest in the customary premises, by virtue of the articles, other than an estate for life, all such estate or interest passed by the will of Robert Marke, to or in trust for his daughter Betty Marke (otherwise Elizabeth Marke) subject to the testator's debts.

He said, he believed that John Haddon, who survived his co-trustee John Marke, by his surrender, called a dormant surrender, taken on the 1st of March, 1785, according to the custom of the manor, surrendered into the hands of the Lord all his messuages, &c. as well bondland as overland, customary as fineable, within the hundred of Staplegrove, as elsewhere within the manor of Taunton Dean, to the use of William Haddon and

Thomas Cornish, their heirs and assigns, according to the custom of the manor, to be holden upon condition to perform the will of John Haddon; and upon further condition that if John Haddon should die before Lady-day, 1792, and in the meantime the premises aforesaid he should not otherwise dispose of or surrender, nor the said surrender revoke, then the surrender was to be and remain in full force, otherwise to be void: And he believed that, by eight several entries or admittances duly made and passed according to the custom of the said manor, on the 23rd of September, 1786, the said William Haddon and Thomas Cornish therein described to be surrenderees in the dormant surrender of John Haddon, deceased, and which said John Haddon was the surviving surrenderee in certain surrenders bearing date the 26th of April, 1769, and made by Robert Marke, deceased, in consideration of a marriage between him and Grace Haddon, spinster, were admitted tenants of the premises theretofore of Robert Marke, deceased, afterwards of Robert Marke his son, and then late of John Marke, deceased, and the said John Haddon, to be holden upon the conditions contained in the said abstracted dormant surrender, and further upon the conditions contained in the surrender of the 26th of April, 1769; and that the said William Haddon survived his said co-trustee Thomas Cornish, and afterwards died without having made any surrender of lands, parcels of the said manor, to the uses of his will; and, that thereupon the same lands descended to his widow, Betty Haddon, who was his heir according to the custom of the said manor; and that the said Betty Haddon, by eight several

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entries taken on the 12th. of October, 1802, therein described to be the widow relict and customary heir of the said William Haddon, was duly admitted tenant to the said premises, according to the custom of the said manor ; and that the said Betty Haddon, by eight several surrenders taken on the 15th of April, 1803, duly surrendered the said premises into the hands of the Lord, according to the custom of the said manor, to the use of the said Elizabeth Marke, her heirs and assigns, for ever ; and that the said Elizabeth Marke duly fined to the Lord of the said Manor for the same lands, and became the legal tenant thereof according to the custom of the said manor.

The defendant by his answer then said that Grace Haddon (afterwards Grace Turner, the mother of the said Elizabeth Marke) had issue by her said husband James Turner, two sons, namely, John Haddon Turner and James Turner, and one daughter, since deceased, and that the said Elizabeth Marke, by her dormant surrender taken the 16th of February, 1812, surrendered into the hands of the lord of the said manor, according to the custom thereof, all her messuages, tenements, lands, and cottages, whatsoever, as well bondland as overland, customary or fineable, within the hundred of Poundisford, or elsewhere within the manor of Taunton Deane, to the use of the said John Haddon Turner, her brother of the half-blood, his heirs and assigns, for ever, to be holden upon condition to perform the will of the said Elizabeth Marke, and upon further condition, that if the said Elizabeth Marke, should happen to die before Lady-day, 1819, and in the meantime the premises aforesaid she should not otherwise dispose of or

surrender, nor the said surrender revoke, then the same surrender should remain in force, otherwise to be void. And he believed that the said Elizabeth Marke duly made and published her last will and testament in writing, bearing date the said 16th of February, 1812, and which was duly executed and attested as by law required for devising estates of inheritance, as the defendant believed, and thereby gave and devised all her messuages or tenements, situate in the parish of Corffe, and county of Somerset, unto her brother of the half-blood, James Turner, his heirs and assigns; and all the rest, residue, and remainder of her messuages, lands, tenements, and hereditaments, she gave and devised unto her brother of the half-blood, John Haddon Turner, his heirs and assigns for ever: And believed that the said Elizabeth Marke died soon after the date and execution of her said will, and that, by eight several entries bearing date the 21st of April, 1812, the said John Haddon Turner, therein described as the surrenderee named in the dormant surrender of the said Elizabeth Marke, was duly admitted tenant of the premises theretofore of William Haddon, deceased, afterwards of Betty Haddon, his widow, and then late of Elizabeth Marke, deceased, to be holden upon the conditions mentioned in the said dormant surrender of the said Elizabeth Marke.

The defendant further said he believed that the said testatrix, Elizabeth Marke, at the time of making and publishing her said will, had no messuages, lands, tenements, or hereditaments, whatsoever, save the said messuages and lands devised by her said will to the said James Turner the younger, and the residue of her said messuages,

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farms, lands, and hereditaments, parcels of the said manor, and devised to the said John Haddon Turner.

The defendant further said, that in or about the month of October, 1820, he the defendant agreed with the said James Turner the younger for the purchase of one close of arable land, containing by estimation six acres, parcel of the said messuage, and one farthingland of bondland, in the tything of Corffe, devised to him by the will of the said Elizabeth Marke, being part of the lands comprised in the said articles of the 24th of April, 1769, for the sum of 300*l*.; and that he paid the sum of 300*l*. to the said James Turner, and that thereupon, by a surrender bearing date the 14th of October, 1820, duly made and passed according to the custom of the said manor, the said John Haddon Turner, as the surrenderee named in the dormant surrender of the said Elizabeth Marke, did, at the request and by the direction of the said James Turner the father, and the said James Turner (the brother of the said John Haddon Turner, and devisee named in the will of the said Elizabeth Marke) surrender into the hands of the Lord; and the said James Turner the father, and James Turner the younger, did surrender, release, and quit claim into the hands of the Lord all their and each of their right, title, estate, and interest, at law or in equity, of, into, and out of the said close of arable land, by the description therein mentioned, to the use of him the defendant, his heirs and assigns; and that by virtue of the said purchase, and of the said surrender he, the defendant, on or about the 14th of October, 1820, entered into the possession of the said hereditaments therein comprised, and into the

receipt of the rents and profits thereof, and that he had ever since been in such possession and receipt.

The defendant further stated, that in or about the month of February, 1824, he agreed with the said John Haddon Turner to purchase other parts of the messuages, farms, lands, and hereditaments, comprised in the said articles of the 28th of April, 1769, for the sum of 5,500*l.* and that he paid in part, and secured by his promissory note other part of the said sum of 5,500*l.*, to the said John Haddon Turner, and that in pursuance of the said agreement the said John Haddon Turner, by seven several surrenders taken the 17th of August, 1824, for the several considerations therein mentioned, amounting together to the sum of 5,500*l.*, to him paid by the defendant, surrendered the premises so purchased into the hands of the lord of the said manor, to the use of him the defendant, his heirs and assigns for ever, according to the custom of the said manor; and that by virtue of the said purchase, and of the said several surrenders, he the defendant, on or about the 24th of June, 1824, entered into the possessions of the said several hereditaments therein comprised, and the receipt of the rents and profits thereof, and had ever since been in such possession and receipt.

The defendant admitted and believed it to be true, that the said Robert Marke had no issue save as aforesaid, and he believed it to be true that the said Robert Marke left no brother him surviving, and that the respondent was his youngest sister, and that the respondent as such youngest sister became, and was at the time of the death of the said Grace Marke, and was then the heiress of the

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said Robert Marke, according to the custom of the said manor; and he said that the widow of the tenant dying seized of customary lands, parcel of the said manor, is his heir of such lands to her and her heirs absolutely; and that the said Grace Marke was therefore at the time of the death of the said Robert Marke his heiress, according to the custom of the said manor.

The defendant admitted, that the legal estate of and in the said premises, did by the means therein-before mentioned become and was vested in him the defendant; but he denied, to the best of his knowledge and belief, for the reasons therein-before mentioned, that the same was subject to the said articles: He admitted that he was the lord of the said manor of Taunton Deane.

The defendant further admitted, that at and previous to the respective times when the said customary premises were surrendered or assured to him the defendant as aforesaid, he was aware of and had notice of the said articles of agreement and the trusts thereof, and that the said articles of agreement were deposited with the court rolls of the said manor, and that the said articles were referred to in the said several eight surrenders of the 26th of April, 1769. He said, that upon the occasion of the said purchase of the said premises in October, 1820, the said John Haddon Turner, James Turner, and James Turner the younger, entered into and executed a deed of covenant with him the defendant, for the title, peaceable possession, and further assurance of the said close of land in the parish of Corffe, bearing date the 14th of October, 1820; and that upon the occasion of his purchase of other parts of the said lands and premises in

February, 1824, it was proposed that the said James Turner, the father of the said John Haddon Turner, should enter with the said John Haddon Turner into a deed of covenant with the defendant for the title of the said last-mentioned premises, and that accordingly a deed of covenant was prepared, bearing date the 17th of August, 1824, from the said John Haddon Turner and James Turner the father, to the defendant for the peaceable enjoyment of the said premises, free from all incumbrances whatsoever, except the fines, rents, heriots, duties, suits and services, in respect of the said premises, and for further assurance; and that the said John Haddon Turner executed the said deed, but the said James Turner refused to execute, and had never executed the same; and, save as aforesaid, he said that he did not receive any bond, covenant, or other instrument or security, by way of indemnity against any claim to be made by the respondent or any other person entitled under the said articles of agreement, or against any other claim in respect of the same premises.

The defendant further said, he believed that the several persons through or under whom he claimed to be entitled to the said customary premises had notice of the said articles of agreement at, and previous to the time when the premises were surrendered, or otherwise assured to them; but he submitted that he was not a trustee of the legal estate in the premises upon the trusts of the said articles, and that the said premises were not, according to the true construction of the articles, upon the death of the survivor of the said Robert Marke and Grace Marke, without leaving issue of the said marriage then living, to be surrendered

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to the person or persons who should then be the customary heir or heirs of the said Robert Marke.

The answer was replied to, and the cause came on to be heard before the Vice Chancellor on the 30th of June, 1829, when a decree was made, whereby it was declared that the respondent was entitled to the customary messuages, lands and premises, in the pleadings mentioned; and it was decreed, that the defendant Thomas Southwood should grant, surrender, or otherwise assure the said customary messuages, lands and premises to the respondent and her heirs and assigns, and that it should be referred to the master in rotation to settle a proper deed, or grant surrender or assurance of the customary premises, in case the parties differed about the same; and that the defendant Thomas Southwood should admit the respondent to the customary premises; and that it should be referred to the master to take an account of the rents and profits of the said customary premises, possessed or received by the defendant Thomas Southwood, or by any other person or persons by his order or for his use, since the death of Grace Marke, in the pleadings named; and that the said Thomas Southwood should pay to the respondent what should be found to be due from him, on taking such account, and deliver up to the respondent, upon oath, the copies of court roll and other instruments and writings in his custody or power relating to the said customary premises.

The Defendant, Thomas Southwood, died in the month of May, 1830, having, on the 8th of October, 1829, presented a petition to the Lord Chancellor, praying for a re-hearing of the cause.

The Respondent, on the 12th of November,

1830, filed a bill of revivor and supplement against the Appellants, stating (among other things) the proceedings in the cause, and the death of Thomas Southwood, and that Thomas Southwood by his last will and testament, bearing date the 18th of May, 1829, devised his estates, and the lands and hereditaments in the pleadings of the original cause mentioned, unto the Appellants Ann Bush and Robert Mattock, as therein mentioned, and appointed the Appellant Robert Mattock his sole executor; and that the Appellant Robert Mattock was under and by virtue of the will the lord of the said manor; and that such estate and interest, if any, as the late Defendant Thomas Southwood had in the customary premises in question, was under and by virtue of the said will vested in the Appellants, and that they, or some, or one of them, entered into, and were in possession or receipt of the rents and profits thereof; and praying that the said suit and proceedings therein might be revived and put in the same plight and condition as the same were in at the time when the same became abated, and that the Respondent might have the benefit of the said suit and proceedings therein against the Appellants, and that the Appellant Robert Mattock might admit assets of the late Defendant Thomas Southwood, come to his hands, sufficient for the purposes of the suit; or otherwise that an account might be taken of the personal estate of the late Defendant Thomas Southwood.

The Appellants put in their answer to the last mentioned bill, and thereby admitted amongst other things the death of Thomas Southwood, and his will, and that he was seized in fee simple of the manor of Taunton Deane, and that the Appellant

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Robert Mattock was under and by virtue of Thomas Southwood's will, lord of the manor, and that such estate and interest as Thomas Southwood had in the premises in the bill mentioned was under and by virtue of the said will vested in the Appellants, and that they had entered into possession or receipt of the rents and profits of the parts devised to them respectively; and the Appellant Robert Mattock admitted assets of the late Defendant, Thomas Southwood, for the purposes of the suit.

The suit was revived by an order, bearing date the 13th of December, 1830.

The original cause came on to be re-heard before the Lord Chancellor, on the 16th day of June, 1831; and the supplemental cause was heard at the same time. On the 20th of June, 1831, his Lordship pronounced a decree in both causes, whereby it was ordered that the decree made in the original cause, bearing date the 30th of June, 1829, should be affirmed; and in the supplemental cause it was ordered and decreed that the Appellants should grant, surrender, or otherwise assure the customary messuages, lands, and premises in the pleadings mentioned, to the Respondent and her assigns; and that it should be referred to the Master to whom the original cause stood referred to settle a proper deed, or grant, surrender, or assurance of the said customary premises, in case the parties differed about the same; and that the Appellant Robert Mattock should admit the Respondent to the said customary premises; and that the said decree should be carried on and prosecuted, and the accounts thereby directed should be taken and carried on between the then parties to the supplemental suit, in like manner

as by the said decree directed as to the parties to the original suit; and that what should be found due on taking the accounts thereby directed from the said late Defendant, should be answered by the said Appellant Robert Mattock, the sole executor of the said late Defendant, out of his assets, the said Appellant Robert Mattock by his answer to the supplemental bill admitting assets sufficient for that purpose; and that what would be found due from the Appellants, on taking the said accounts, should be answered by them personally.

From this decree the appeal was presented.

For the Appellants, Sir *W. Horne* and Mr. *Preston*.

The ultimate limitation in the marriage articles, in default of issue of the body of Robert Marke, the settlor, on the body of the said Grace Haddon, living at the death of the survivor of them the said Robert Marke and Grace Haddon, "to the use of "the right heirs of the said Robert Marke and "settlor, for ever, according to the custom of the "manor," was a reservation of the old estate of the settlor, and revested the estate in him, subject to the previous limitations, and upon his death the same descended to and vested in his widow (who survived him) as his heir, according to the custom of the manor, and not, as contended for on the part of the Respondent, a limitation by purchase to an unknown and uncertain person, who by chance might happen to answer the character of customary heir at the death of the survivor of the settlor and his wife. The manifest object and intention of the marriage articles was confined to the making a provision for the wife of the settlor and the children of the marriage, the marriage

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articles being, according to an express recital contained therein, made in consideration of the marriage, and of the marriage portion or fortune of Grace Haddon the intended wife. If Robert Marke had survived his wife and daughter, he would have been entitled to have called on the trustees to re-surrender the customary premises to him, the sole objects and purposes of the trusts having been spent and gone. It never could have been the intention of the settlor to settle his own estate, so that even if his wife died the day after the marriage, his interest therein should be reduced to a life estate merely in favour of a person uncertain and undefinable during his life, and from whom no consideration, either directly or indirectly, moved. A provision for any person or object unconnected with the marriage is negatived by the first trust in the articles, viz. the trust to permit Robert Marke, his heirs and assigns, to hold and enjoy the premises until the marriage: it is contended on the part of the Respondent, that this case is an exception to the general rule of construction in such cases, inasmuch as the trustees are, by the terms of the trust, required to do an act after the happening of the contingency, viz. to surrender the trust estate; but it is submitted, that this expression is mere form, part of the *cantilena* of trusts, and did not exclude the right of the settlor to his old reversion as a reversion.

If the ultimate limitation was not a reservation of the old use, the contingency upon which the same was to take effect ceased on the death of Elizabeth Marke, the only issue of the marriage in 1812; and upon such event the ultimate limitation vested in Grace Turner, the widow, and heir of

the testator, according to the custom of the manor. The custom of the manor which constitutes the youngest sister heir according to the custom, applies only to a descent taking place at the death of the owner; and at that time the Respondent was not heir, or customary heir. The settlor, after the purposes of the settlement are satisfied, is supposed to divest himself of the dominion of his property in favour of some unknown object, a person not in existence; and if his wife and children should die in his lifetime, to deprive himself of the power of providing for any future wife or child. The question then arises, who are the right heirs, and when are they to be ascertained? at the death of the settlor or that of his widow? An heir to take by purchase should be so at the death of the ancestor. *Holloway v. Holloway* \*; *Long v. Blackall* † It may be said that the widow or daughter could not take as heirs, since they are provided for by the settlement. But the widow takes only a life estate. The persons destined to take under the limitation of the settlement are, the husband, wife, and children. The children may be preferred to the wife; but there being no children, why may not the wife take? The heir, to take as purchaser, is, by the custom, the heir by limitation, is of the old use. *Thrustout v. Cunningham* ‡; Robinson's Gavelkind, 117. All reversions, after particular estates created, vest in the grantor. Co. Litt. 22. b. A tenant in fee creating an estate tail, hath a reversion. *Tippen's Case*. § In *Goodtitle v. Pugh* ||, it was to the right heirs, the son being excepted; and Lord Mansfield was misled.

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\* 5 Ves. 399.

† 3 Ves. 486.

‡ 2 Black. 1046.; more fully reported Fearn, C. R. 68.

§ Cited 1 P. W. 353.; Fearn, 51.

|| Fearn, 573.

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That this is the case of a copyhold makes no difference. The old use was not taken out of the settlor, and he required no new admission. It was the remnant of the old estate. If the widow was not entitled as the customary heir, the daughter, as heir, procured a conveyance from the trustees, and obtained the legal estate, which estate the Appellant holds as a purchaser for valuable consideration.

A title adverse to that claimed by the Respondent having, by the surrender to Elizabeth Marke in 1803, existed for twenty-one years, at the time when the Appellants' testator purchased the estate in question, and he having so purchased for a valuable and full consideration, the Respondent was barred of all title to relief in equity.

The copyhold interest in the estate having been surrendered to the late Defendant, he being lord of the manor and seised of the fee, became merged and extinguished, and cannot be revived at law, and the directions of the decrees cannot be carried into effect by the Appellants.

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For the Respondents, Sir *Edward Sugden* and Mr. *Jacob*.

This is not the ordinary case of a limitation to the right heirs of a settlor. There are circumstances which point out that the heir is to take as a purchaser. The lands being of copyhold tenure, a surrender is made, a trust created, and the trustees are directed to convey, and the heir who is pointed out by the limitation is to pay for the charges of the conveyance. How can these provisions be made, consistent with the supposed intention, that the limitation to the heirs of the

settlor was a reservation of the use to himself. The case of *Holloway v. Holloway* is different from this in circumstances and principle ; and if it were applicable, it is answered by *Miller v. Eaton*. \* To suppose that the daughter, having a life estate by the settlement, should take under the limitation, is inconsistent : so the wife—having also, by express limitation, a life estate under the settlement, although by the custom of the manor she might be right heir—could not by her own death come into possession as right heir. *Doe v. Frost*. †

### Reply.

The surrender and the trust of the whole estate was necessary, 1st, To protect the contingent limitations ; 2dly, Because the whole body of the estate might have vested in the issue of the marriage, if any had survived the parents. But this was the ultimate object of the settlement, and there was no consideration for the deed, nor any purpose of the settlement beyond these limitations. Nor is it the less a resulting use because it might be defeated by contingencies. This is a limitation to “right heirs,” the most technical words which could be used—words which have received a fixed sense by a settled rule of construction. If the rule is to be affected by any inference of intention, that should be made out clearly and without doubt. *Doe v. Frost* was the case of a will of very peculiar provisions, wholly inapplicable to this case, which is that of the owner of an estate making a settlement, and meaning to retain possession of the estate until the contract comes into operation, and to reserve what remains after the purposes of the contract are fulfilled. This is the

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\* Cooper, 272.

† 3 B. &amp; Ald. 546.



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apparent intention. There is at least a doubt upon the construction, and in such case the settled rule ought to prevail.

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In the course of the argument, the Lord Chancellor said, that the case was fully argued in the Court below, and that he had a long conference with the Master of the Rolls upon the subject; that the effect of the words "for ever" were much discussed, and were the only words which raised a doubt in his mind; that the Master of the Rolls had mentioned *Doe v. Frost*, and his argument in that case, which was contrary to his judgment in this.

Lord Wynford, at the conclusion of the argument, said, that he had not formed any decided opinion upon the question; that if, upon consideration of the authorities, he should not feel satisfied, the opinion of the judges might be requisite; and he moved an adjournment, in which the Lord Chancellor concurred, but said, that he retained the same opinion as upon the hearing in the Court below.

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Sept. 5th.

Lord *Brougham*.—In the case of *Bush* and *Locke*, which was heard in the Court of Chancery, a question was raised when it came here, whether it ought not to be heard a third time before the judges. It appears from all that passed in the Court of Chancery, and also from what passed here, that it really was not a case fit to be heard before the judges. There was no doubt whatever, that there was equity involved in the case; it was by no means a pure question of law. Deciding the question of law which was involved in it might have influenced the judgment in one

way; deciding the other way would not have touched the judgment at all. It was agreed by the counsel on both sides in the Court of Chancery, according to my recollection, and according to a note which I have since looked into, that it was not a fit case to be sent to a court of law; and if it was not a fit case to be sent to a court of law, your Lordships will not think it a case in which the judgment ought to be delayed for the opinion of the judges. But be that as it may, the point did not appear to me, *in the event of its being heard on the mere law said to be involved in this case*, to admit of any reasonable or fair doubt. I have carefully considered this case: I considered it, at the time of the argument, and I advised your Lordships to put off deciding it in consequence of the absence of my noble and learned friend Lord Wynford. It has stood over one whole session, and to the end of this session, and it is hardly fair to the parties to put it off longer. With the great uncertainty of the attendance, from the state of his health, of my noble and learned friend, and the improbability of his being able to attend next session, I think I should not discharge my duty if I did not advise your Lordships to affirm that decision. I do not recommend your Lordships to give any costs of the appeal, because the noble and learned Lord expressed doubt whether it was a case for the opinion of the judges.

Judgment affirmed.

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## ENGLAND.

(COURT OF KING'S BENCH.)

JOHN DOE, on the demise of } *Plaintiff in Error;*  
 JOHN BIRTWHISTLE - - }

AGNES VARDILL - - *Defendant in Error.*

Upon a special verdict in an action of ejectment, the following facts were found:— William Birtwhistle being seised in his demesne as of fee, of and in one undivided third part, of and in the premises mentioned in the declaration, on the 12th of May, 1819, died so seised without leaving any issue of his body. All the brothers of the said William Birtwhistle had died in his lifetime, and they all died unmarried, and without issue, except Alexander one of the brothers of the said William, who married and had issue in the manner and at the time hereinafter particularly mentioned. The said Alexander Birtwhistle went from England into Scotland in the year 1790, and became and was domiciled there, and there remained and dwelt so domiciled until the time of his death as hereinafter mentioned. One Mary Purdie was also a person dwelling and remaining in Scotland, domiciled there during the whole of the period of the time in which Alexander Birtwhistle was so domiciled there as aforesaid. Alexander Birtwhistle and Mary Purdie being so domiciled in Scotland, the said Alexander Birtwhistle did cohabit with the said Mary Purdie, and did beget upon the said Mary Purdie (the plaintiff) John Birtwhistle, which said John Birtwhistle was the only son of the said Alexander Birtwhistle and of the said Mary Purdie, and was born in Scotland on the 15th May, 1799. After the birth of the said John Birtwhistle, that is to say, on the 6th day of May, 1805, the said Alexander Birtwhistle and Mary Purdie were married in Scotland, according to the laws of Scotland. On the 5th of February, 1810, Alexander Birtwhistle, the father of the said John Birtwhistle, died in Scotland, seised to him and his heirs of divers lands and tenements there situate, leaving the said John Birtwhistle him surviving, who, after the death of his father, was duly, according to the law of

Scotland, served heir to the said lands and tenements of the said Alexander Birtwhistle, and now holds and enjoys the same in his own right, he, the said John Birtwhistle, having, from the time of his birth, hitherto dwelt and remained in Scotland, and been domiciled there. If a marriage of the mother of a child with the father of such child takes place in Scotland, such child born in Scotland before the marriage is equally legitimate by the laws of Scotland with children born after the marriage for the purpose of taking land, and every other purpose. After a judgment for the defendant upon a writ of error in Parliament, the House of Lords proposed the following question to the Judges:—"A. went from England to Scotland, and resided and was domiciled there, and so continued for many years till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son B. who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland, according to the laws of that country. By the laws of Scotland, if the marriage of the mother of a child with the father of such child take place in Scotland, such child born in Scotland before the marriage is equally legitimate with children born after the marriage, for the purpose of taking land and for every other purpose. A. died seised of real estate in England, and intestate; is B. entitled to such property as the heir of A.?"

To this question the Judges answered in the negative.

If any error or deficiency in the statements of fact appears in the special verdict, whether a *venire de novo* may be awarded — *Quære*.

THIS case arose upon a bill filed in the Court of Chancery, in 1823, by Birtwhistle, Plaintiff, against Vardill, Defendant, stating his title, that the Defendant had entered upon the lands in dispute during the infancy of the Plaintiff, and received the rents and profits whereby she became liable to account as Guardian in socage, charging among other things, that the ancestor had died indebted in various specialties, and praying a receiver, an account of rents, &c., delivery of the title-deeds, &c.,

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and that the personal estate might be applied in payment of the specialty debts. Upon a motion for the receiver, and delivery of the deeds, the Lord Chancellor (Eldon) directed an action of ejectment, to be brought in the Court of King's Bench, and pressed upon the parties the necessity, in a case of such importance to the settlement of the law, that a special verdict should be taken, intimating a decisive purpose upon application by either of the parties, to direct a new trial if they came back to the Court of Chancery with a common verdict. Accordingly, the action was brought by the Plaintiff against the Defendant in error, and a special verdict taken.

No The case upon this special verdict was argued before the Court of King's Bench in 1826, when judgment was given for the Defendant. A writ of error was then brought in Parliament, and, the Judges attending upon summons, the case was argued by Brougham and Dr. Lushington for the Plaintiff in Error, and by the Attorney-General and Courtenay for the Defendant in error.

For the Plaintiff in error the reasons and argument were as follows : —

The substantial question in issue is, whether the lessor of the Plaintiff is, or is not, entitled to the character and *status* of heir of his father, to the effect of inheriting a real estate, situate in England, as being, or not being, the *lawful son* of his said father.

The lessor of the Plaintiff having been *pro-created* and *born* in Scotland, the *marriage* of his parents having taken place there, and his father having been *domiciled* in Scotland, at the time of the memorialist's birth, at the marriage, and at his own death, the question necessary for determining

whether he is, or is not, the heir of his father, is, whether he was, or was not, at the death of his father, a son born to him *ex justis nuptiis*, in that country.

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By the *law of Scotland*, as fully settled for centuries, there is no doubt that the lessor of the Plaintiff is a lawful son of his father, *procreated and born ex justis nuptiis*.

This doctrine of the law of Scotland, which is found in the verdict and can be established by abundant authority, depends on the principle of legitimation *per subsequens matrimonium*. But this circumstance in no respect alters or affects the question, as to the lessor of the Plaintiff's lawful *status*, as a man born in Scotland, the son of parents *domiciled* there. When the fact of the marriage of the parents is ascertained, the law takes no cognisance of the circumstance of a child having been born *before* or *after* the marriage, except in the single case of a legal impediment to their marriage having existed *at the date of the procreation*, so that they *could* not legally have been *then* married. The rule and principle of the law is thus laid down by the leading authority: —  
 “The subsequent marriage by which this sort of  
 “legitimation is effected, is, by a fiction of the law,  
 “considered to have been contracted when the child  
 “legitimated was begotten; and consequently no  
 “children can be thus legitimated, but those who  
 “are procreated of a mother, whom the father at  
 “the time of the procreation might have lawfully  
 “married.” The exception here stated manifestly confirms the rule as in other cases. And the principle is not, that the children are to be held legitimated by a *positive law*, although still *taken*

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the country where the real estate is situate are bound to assume the *status* of the individual as matter of fact, upon such evidence of the law of the country where the birth, marriage, and domicile existed, as would be sufficient to establish the same *status* in any other question.

The Plaintiff can by no means admit that the established rule as to succession in real estate, which is not peculiar to the law of England, but is only a branch of the law of nations, acknowledged by the English Courts, has any effect to decide the present question. That law must unquestionably determine thus far, that the person entitled to the character of heir, and so to take real estate, situate in England, must *be* the *legitimate son of his father*, and *not a bastard*. But the question, whether an individual *is* the legitimate son of his father or a bastard, is not a question as to the succession to real estate, but a question regarding the *personal status* and condition of the party. The right of succession given by the law of England, and limited by it to persons born *ex justis nuptiis*, is only *consequential* upon that *status*, which regulates many other rights both in England and elsewhere, having no connection with real estate. And it would be a singular result, if the same Court in England could, on the same day, pronounce judgment in favour of an individual making a claim solely on the ground of his being the *lawful-born son* of his father, and also give judgment against him in *another* claim as being a *bastard*.

The *status* of legitimacy or bastardy, once established in the proper jurisdiction, follows the individual into any country; it cannot, on correct principles, be varying and fluctuating, but must be

fixed and certain, wherever the matter of right depends on legitimacy or bastardy, as matter of fact; and though the case of Shedden is the converse of the present case, the judgment in it necessarily proceeds on this fundamental principle.

The statute of Merton \* is not repugnant to the claim of succession, made by the lessor of the Plaintiff, and at any rate presents no obstacle to the plea in law maintained by him.

The title of that statute is, "*He is a bastard* " that is born before the marriage of his parents." This title, which has been referred to, as decisive of the present question, seems, with the utmost deference, rather to shew that the statute cannot have determined it. For, although there is reference in the body of the act to the right of *inheriting*, as all enactments of the legislature, and all discussions in courts of law, must have reference to *some* beneficial rights, it appears from the title, that the statute had relation simply to the question of *personal status*. It does not lay down a limiting technical rule, governing real estate in England, *and nothing else*. Its object is to define *who* shall be considered a bastard under the law of England. And it fixes that *personal status*, by refusing to alter the law previously established, by which all persons, born before the marriage of their parents, were held to be bastards.

But, though the statute determined the *personal status* of persons so situated, it did and could only relate to persons who were *so situated under the law of England*. As to *them*, it determined the *status* absolutely, and, what is accordingly material in the present argument, it so determined it as to

\* 20 Henry III. c. 9.

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them, *not only* to all effects whatsoever, under the law and within the territory of England, but to all effects whatsoever *in every other country* where the international law is recognised. And so, according to the case of Shedden, no person, who *is a bastard in England*, under the statute of Merton, could succeed to real estates in Scotland, notwithstanding that, by the law of that country, if the *same* facts had taken place *there*, he would have been deemed the lawful son of his father. The principal of the *lex loci rei sitæ* is as powerful in the one case as in the other. The rule of succession to real estate in Scotland is fixed by as determinate rules as in England. The eldest son, born *ex justis nuptiis*, is the heir of his father, and no other. And that law must govern in the succession to real estate. But then the courts of that country are bound, in order to see who is the lawful son of the deceased, to look to the place of the birth, the marriage, and the domicile, and to settle the question of *status* by the law of that place.

The statute of Merton, therefore, operates no more in the one case, than the law of Scotland operates in the other. It determines *who shall be a bastard*, under the law of England. It does not determine that a person *not born* under the law of *England* shall have *no status* under that law, or shall have his *status* determined by a law which is foreign to the circumstances of his nativity. There is nothing in the statute which determines that, in this point of *personal status*, the law of England, in the very case of collision, most frequent in all countries, that of succession to real estate, is to reject the principles of international law, and hold by its own technical rule as to personal legitimacy

or bastardy. The Plaintiff does not find this in the statute, and it seems to him to leave the question precisely where it would have been if the proposal had never been made to alter the law as to persons born before marriage, and if the act did not stand in the statute book at all. It would have been true, on that supposition, as it is now, that persons born in England before the marriage of their parents are, by the law of England, bastards, and cannot inherit. But it would still have been true, that persons born in Scotland, of domiciled Scotch parents, who are, by the law of Scotland, lawful children of their father, are not affected by that law, and ought to be taken as lawful children in England, upon evidence of the fact of their legitimacy so established.

The statute bears, "He is a *bastard* that is born *before the marriage* of his parents." And, it is asked, does not this determine who is entitled to the character of *heir*, in real estate, in England? Another statute has, by its enactments, substantially declared, that "*he is a bastard* whose parents have "not been married in the *church*, or by *special licence*, &c. She shall be deemed the lawful "wife or widow of a man who has been so married, " &c." But, though the character of bastardy is thus fixed by the *non-existence* of certain declared forms, and the widow's rights are determined by the same rule, it will not assuredly be maintained that the law of England, even in a question of *real estate*, will not acknowledge the rights of an individual born of a *marriage lawfully celebrated in Scotland*, or that a woman would be defeated of her dower upon the same ground. Yet the form of expression, in announcing the law of England

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on the question of *status*, may be put in the very same words in these cases and in the present case.

The ground upon which a marriage, constituted in Scotland, is acknowledged at all in the English law, as giving rights of legitimacy and *inheritance*, should be kept in view. Marriage is a contract; and the constitution of contracts is regulated by the law of the place where they are entered into. The law of England acknowledges this principle. This must be the answer:—But *why* does the law of England so bend to the law of another country, while its own law of marriage and inheritance is directly opposed to it, and the *lex loci rei sitæ* still rules? There seems to be no reason but this,—that, the contract being lawfully constituted, all the consequences which flow from its constitution, *according to its nature*, in the foreign country, must be admitted to it in England; and, therefore, the *status* of the children born must be determined accordingly. The marriage of the parents in Scotland is admitted to give legitimacy, although contrary to the law of England. But the marriage by the law of Scotland was constituted, *not by the ceremony*, nor at the date of it, but at the *date of the procreation* of the child,—that is, the marriage which gives the legitimacy under the law of Scotland. If it is to be taken at all, it must be taken as it is, and the legitimacy of the lessor of the Plaintiff follows inevitably, on the principle admitted.

The Plaintiff's argument is not, that, in every particular, the consequences of a contract are to be determined by the law of the place where it was entered into. What he contends is, that, in the sufficiency of the contract, *by its own nature*, to

produce the *status* of legitimacy, it necessarily must be conclusive, if the marriage itself is to be at all recognised as giving legitimacy, though the same things done in England would not give it. And he may thus meet directly the title of the statute of Merton—" *He is a bastard that is born before the marriage* of his parents," by stating, that the courts are here bound to hold in principle, and as matter of fact, that the lessor of the Plaintiff was *not* born *before the marriage* of his parents, in the legal sense of the term ; for, though it is true that he was born before the *ceremony* of marriage was performed, he is, by the law of Scotland, a legitimate son of his father in Scotland, and confessedly in England also, in *all other* questions, *solely* on the principle that the present consent, which constitutes marriage, *draws back to the date* of his *procreation*, and that, consequently, his birth was *after the constitution* of that marriage.

The argument of the Respondent resting on the principle, that this is a question of succession to real estate, and that, therefore, the law of England must govern, amounts in effect to a change of the issue between the parties. The subject matter in dispute is indeed the right of succession to a real estate. And in order to establish his claim to it in the law of England, " the lessor of the Plaintiff must shew " that he is the *lawful son* of his father." But the issue really joined between the parties becomes this: whether he is *legitimate*, or a *bastard* ; and the solution of this question must depend on the law of Scotland. It is impossible to explain either the case of *Shedden v. Patrick*, or of lord *Strathmore v. Bowes*, on any other principle.

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For the Defendant in error, the argument was in substance the same as in the Court below. \*

The following are the authorities upon the questions raised : —

Cases of marriage, legitimacy, and capacity to inherit: *Monro v. Ross*, or *Saunders*, 6 Bli. N. S. 468.; *Shedden v. Patrick*, see 6 Bli. 487.; *Strathmore Peerage Case*, D. P. 1821, mss.; *Dalrymple v. Dalrymple*, 2 Haggard, 58.; *M'Adam's Case*, 1 Dow. 148.; and Bli. mss. notes:—Cases of Divorce, *Lolley's Case*, Russ. and Ryan, C. C. 237.; *Tovey v. Lindsey*, 1 Dow. 117.: Case of Dower: *Ilderton v. Ilderton*, 2 H. Blac. 145: Cases of Foreign laws applied to other contracts—*Feaubert v. Turst*, Prec. in Ch., 207.; *Freemoult v. Dedire*, 1 P. W. 429.; *Alves v. Hodgson*, 7 T. R. 241.; *Male v. Roberts*, 3 Esp. 163.; *Inglis v. Usherwood*, 1 East 515.; *Clegg v. Levy*, 3 Camp. 166.; *Millar v. Heinrick*, 4 Camp. 155.; *Inglis v. Boutlingk*, 3 East, 381.; *Innes v. Dunlop*, 8 T. R. 595.; *Holman v. Johnson*, Cowper, 341.:—Cases under bankrupt laws—*Sill v. Worswick*, 1 H. Blac. 665.; *Potter v. Brown*, 5 East 124.; *Hunter v. Potts*, 4 T. R. 182.; *Burrows v. Jemino*, 2 Stra. 732.; 2 Eq. Abr. 476. Mose. 1.: Cases of intestacy—*Pottinger v. Wightman*, 3 Meriv. 67.; *Gordon v. Gordon*, 3 Swan. 400.; *Somerville v. Somerville*, 5 Ves. 750.; *Brodie v. Barry*, 2 V. and B. 127.; *Ryan v. Ryan*, 2 Phill. 332.

General Authorities, Co. Litt. 76. a.; *Hertins Heineccius*, Huber. de Conflic. leg. Vol. 2. p. 24. Balfour's Pract. 239. s. 9.—Craig. B. II. dieg. 13. 16.—Bankton B. tit. 5. s. 54.—Erskine B. s. 52.—Nov. 19. 89.—Pothier. Trait. du Marr. pt. 5. c. 2. art. 2. sec. 4, 5. As to modes of legitimation—J. Voet. 25. 7. 4.: Huber. Vol. 1. p. 31.;

\* See 5 B. and C.

Vinnius, 78. b. As to the personal status of slavery, Somerset's case, Harg. jurisc. Exerc. 6. and Lofft. 1.; where the law of an English colony was rejected. The stat. of Merton declaratory of the law, Co. 2. Inst. 97. citing Glanville, B. 7. c. 15.; Bracton, c. 5. fo. 416.; Fleta, L. 6. c. 38.; Fortesc. c. 11. 39. Ass. pl. 20. Selden Diss. ad Flet. c. 9. s. 2. Reasons against admission of foreign law:—J. Voet: B. 38. tit. *Digressio de Feudis*, s. 80. *et seq.* on the question how far the law as to personal *status* is controlled by the law of Feuds, as to the capacity to inherit. \*

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The Judges upon summons attended the House upon the argument, at the conclusion of which a question was put to them. On the 10th of June, 1830, the Lord Chief Baron, (Sir *W. Alexander*,) delivered the opinion of the Judges as follows:—

In this case the Judges have agreed upon the answer which is to be given to the question put to them by your Lordships.

It appears to us that whenever a question of this nature arises in an English court of justice, there are two points to which the attention of the Judge must be directed, separately and in succession to each other.

The first in order regards the *status* or condition of the claimant. The second is, what rules of inheritance the law of the country, where the property is situated and the tribunal sits, has impressed upon the land the subject of the claim?

As to the first of these questions, I believe, I express the opinion of the Judges, when I say in the well-considered language of Lord Stowell, in the case of *Dalrymple v. Dalrymple*, "The cause

See note A. at the end of the case.

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“ being entertained in an English court, must be  
 “ adjudicated according to the principle of the  
 “ English law applicable to such a case; but the  
 “ only principle applicable to such a case by the  
 “ law of England, is, that the *status* or condition  
 “ of the claimant must be tried by reference to  
 “ the law of the country where the *status* origi-  
 “ nated: having furnished this principle, the  
 “ law of England withdraws altogether, and leaves  
 “ the question of *status* in the case put to the law  
 “ of Scotland.” Such is the sentiment of that  
 great Judge, and such is his language, varied only  
 so far as to apply to a question of legitimacy what  
 was said of a question respecting the validity of  
 marriage.

When the question of personal *status* has been  
 settled upon these principles, when it has been as-  
 certained what the claimant's character and situ-  
 ation are, it becomes then necessary to inquire  
 what are the rules and maxims of inheritance  
 which the law of that country where the inheri-  
 tance is placed, and whose tribunals are to decide  
 upon it, has stamped and impressed upon the land  
 in debate.

In order the more distinctly to explain what is  
 meant, I will suppose a case in many circumstances  
 resembling the present. In addition to the cir-  
 cumstances stated in the question, let it be further  
 supposed that the father and mother of the claimant  
 had, after their marriage, one or more sons born to  
 them. Suppose then the present claim to be made.  
 The first inquiry having been satisfied, and it  
 being upon that inquiry perfectly ascertained that  
 the claimant is the eldest legitimate son of his  
 deceased parent for the purpose of taking land,  
 and for every other purpose, by the law of Scot-

land, it will next be requisite to inquire what are the rules and maxims of inheritance which the law of England has impressed upon that land which is the subject of the claim. Let it further be supposed, that upon this inquiry it shall turn out that the land claimed is of that description which is called Borough English. This being proved, we think it clear that the claimant's legitimacy by the law of Scotland, his right to inherit by that law, will give the claimant no right whatever to the land in England held in Borough English.

The comity between nations is conclusive to give to the claimant the character of the eldest legitimate son of his father, and to give him all the rights which are necessarily consequent upon that character: but what these rights are respecting English land must be left to the law of England, and the comity is totally ineffectual to alter, in the slightest degree, the rules of inheritance and descent which the law of England has attached to this English land. It would, unquestionably, descend upon the youngest son. I am anxious to mark clearly the distinction which I have pointed out, because it is upon that distinction that our opinion turns. I will, therefore, illustrate it by another example.

Take the case of *Ilderton v. Ilderton* (2 H. Blac. 145.); that is the case of a claim to dower by a foreign widow: whether she is a widow or not, that is, whether she was the lawful wife of the man who was, during the coverture, seised of the land, is a question which the law of England permits, upon a claim to English land, to be determined by the foreign law, the law of the country where the contract of marriage was made: there

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the comity stops. When her character of widow shall have been fixed according to these foreign rules, the law of England comes into action, and, proceeding inexorably by its own provisions and regulations, decides what are the interests in the English land which her character of widow has conferred upon her. It inquires what are the rules which attach upon the particular land in favour of a widow. If, upon that inquiry, it appears that the land is subject to the common law, it will give her a third; if it appears to be gavel-kind, one half, while she remains *casta et sola*. If the land be customary land of any manor, the custom must be looked into; and she can have only what that custom shall bestow, however strange and capricious that custom may be.

The distinction to which I am directing your Lordships' attention is very familiar to foreign jurists, and is noticed by them as the difference between real and personal *status*: the last being those which respect the person, and follow it every where; the first being those which are connected with the land, and adhere to it, and are as immovable as the subject to which they are applied.

My Lords, it appears to us, that the answer to the question which your Lordships have put must be founded upon this distinction; — while we assume that B. is the eldest legitimate son of his father, in England as well as in Scotland, we think that we have also to consider whether that status, that character, entitles him to the land in dispute as the heir of that father; and we think that this question, inasmuch as it regards real property situated in England, must be decided according to those rules which govern the descent of real pro-

perty in that country, without the least regard to the rules which govern the descent of real property in Scotland.

We have therefore considered, whether, by the law of England, a man is the heir of English land, merely because he is the eldest legitimate son of his father. We are of opinion that these circumstances are not sufficient of themselves, but that we must look further, and ascertain whether he was born within the state of lawful matrimony; because, by the law of England, that circumstance is essential to heirship; and that this is a rule not of a personal nature, but of that class which, if I may use the expression, is sown in the land, springs out of it, and cannot, according to the law of England, be abrogated or destroyed by any foreign rule or law whatsoever. It is this circumstance, which, in my judgment, dictates the answer we must give to your Lordships' question, viz. that in selecting the heir for English inheritance, we must inquire only who is that heir by the local law. It has appeared to us that the vice of the Appellant's argument consists in treating the question of who shall be heir to English land as a question of personal *status*. So it is, no doubt, up to a certain point, but beyond that point it becomes a question to be decided entirely by the local rules relating to real property in the realm of England.

That the rule of the English law is what I have represented, can hardly require proof. If the argument from the comity of nations be shaken off, no man will doubt that a person legitimated *per subsequens matrimonium* is not the heir of English land. What my Lord Coke says, in page 7. of the first Institute, affords the rule: — "*Hæres*, in

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“ the legal understanding of the common law, im-  
 “ plyeth that he is *ex justis nuptiis procreatus*, for  
 “ *Hæres legitimus est quem nuptiæ demonstrant.*”  
 Perhaps my Lord Coke’s expression would have  
 been more precise and accurate, if, instead of say-  
 ing: “ *ex justis nuptiis procreatus*,” he had said  
 “ *ex justis nuptiis natus.*” But this is what is  
 meant, as all experience shews. It would be  
 useless to follow this further, but it will be material  
 to recollect, that this maxim, which pervades all  
 our books, and which is confirmed by all our prac-  
 tice, though it is, in form, a description of the  
 person who shall be heir, is, in substance, in our  
 opinion, a maxim regarding the land, describes  
 one of its most important qualities, traces out the  
 course in which it shall descend, and is no more  
 liable to be broken in upon by any foreign consti-  
 tution than are the degree of interest which the  
 heir shall take in the land, the conditions on which  
 he shall hold it, the proportion which a woman  
 shall obtain as a widow, or the limitations and con-  
 ditions attached to her estate.

I have endeavoured to state the principles and  
 to shew the course of reasoning which has con-  
 ducted my learned brothers and myself to the  
 conclusion, that B., the person designated by your  
 Lordships, is not entitled to the property in ques-  
 tion as the heir of A. Before I finish I will notice  
 two arguments used on behalf of the Appellant,  
 which merit particular attention.

It is said for the Appellant, that, according to  
 the rule we adopt, if he is born in lawful wedlock,  
 he fulfils every condition required of him: now  
 they say he is born in lawful wedlock, because, by  
 a presumption of the Scottish law, a presumption

*juris et de jure*, there was a marriage anterior to his procreation. It is by force of this presumption that he is legitimate: by this fiction he is born within the pale of lawful matrimony. We know that this fiction is, by many respectable writers on the Scottish law, represented as accompanying the legitimation *per subsequens matrimonium*. But we do not concede the consequence deduced from it as applicable to the present question. The question is, what the law of England requires, and, as we are advised, the law of England requires that the claimant should *actually*, and, *in fact*, be born within the pale of lawful matrimony, we cannot agree that the presumption of a foreign jurisprudence, contrary to the acknowledged fact, should abrogate the law of England, and that by such a fiction a principle should be introduced, which, upon a great and memorable occasion, the legislature of the kingdom distinctly rejected: your Lordships will perceive that I allude to the statute of Merton. It would seem strange to introduce indirectly, and from comity to a foreign nation, a rule of inheritance which may affect every honour and all the real property of the realm; which rule, when proposed directly and positively to the legislature, they directly and positively negatived and refused: a refusal that, in England, has obtained the approbation of every succeeding age.

Again, my Lords, it is said that two cases have been decided in this House which are nearly in point, and will prove that the claim of B. should be supported. These cases are the cases of *Shedden v. Patrick*, and the case of Lord *Strathmore*. These two cases are alike in principle, and establish the same proposition. In the one case the parents

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lived in a state of concubinage in America, and in the other in England. In both children were born to them. Afterwards, the parties married in their respective countries; by force of their marriages the American issue claimed Scottish land, and the English issue claimed Scottish honours: in both your Lordships decided against the claimants. Now, it is said, these authorities are exactly the converse of the present case. They establish the principle, that the courts of the country where the lands lie, in a question respecting the heirship to these lands or honours, inform themselves whether the claimant is heir, not by the law of the country where the lands lie, but in the country of the domicile, where the marriage of the parents was contracted; and if he is not heir by that foreign law, his claim is rejected; from which they deduce this consequence, that if he is heir, his claim should be sustained.

This argument presents itself in a very plausible shape, and was pressed at the bar, as it seemed to me, with striking ingenuity and force. But if I have had the good fortune sufficiently to explain the principles which have conducted my learned brothers and myself to the opinion I have stated, you will soon perceive that these principles afford a conclusive answer to it. The first step to be taken in every case of this kind, as I have already explained, is to enquire into the *status* of the claimant. The *status*, it is argued, is to be determined by the law of the foreign country; with this the *lex rei sitæ* does not intermeddle, and intermeddles no more when that foreign law establishes the claimant's bastardy than when it proves his legitimacy. In both the cases the claimants were bastards; the laws of their own country, the laws

of their domicile, the laws of the spot where the matrimonial contract was entered into, declared them to be illegitimate: the law which, by the acknowledged principles, ascertained their personal *status*, fixed upon these persons a character of illegitimacy fatal to their claims: on the first step the ground sunk under them, and it became impossible for them to advance.

It is obvious, that if in the cases to which I am now referring, the claimants had been declared heirs by the Scottish law, the Scottish law admitting of no heirship without legitimacy, must have been called in aid to bestow upon them that personal character of legitimacy refused to them by their own law; in other words, a law foreign to their birth, to their domicile, and to the marriage of their parents would have been held to bestow upon them their personal status and character, — a decision certainly contrary to the acknowledged principles upon this subject. The character of illegitimacy attached to the persons of the English and American claimants by their own law, accompanied them every where, and would prevent their being received as heirs any where within the limits of the Christian world. This view, in our judgment, renders these decisions entirely consistent with the principles I have unfolded, and prevents our considering them as objections to the opinion I entertain, that B. is not entitled to the property in question as the heir of A.

My Lords, it is matter of satisfaction to us to reflect that this rule, held by us to be the rule of the English law, is more useful and convenient than the rule opposed to it contended for by the Appellant. Convenience and utility, when it re-

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gards so important a subject as inheritance, appears to me to be of the highest consequence in the administration of justice. The rule I have stated, which limits the operation of the foreign law to fixing the personal *status*, and excludes it from any ulterior influence in regulating the succession to real property, has a manifest tendency to render the law of inheritance simple and uniform, by preserving it unaltered and unchanged, and by sending us to look for it among our own municipal institutions alone, and among the decisions of our predecessors applicable to such questions.

It will exclude many difficult and intricate inquiries which might intrude themselves from foreign laws into this subject. Some of these were suggested at the bar in the argument for the Respondent; and there would be many others, whose details no human foresight can anticipate, although the various transactions of mankind, and the variety in the laws of foreign nations would assuredly bring them upon us.

My Lords, I conclude that it is the humble opinion of all the Judges who have attended the argument of this case, that B., described in your Lordships' question, is *not* entitled to the property in England as the heir of A.

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*The Lord Chancellor.* — (After this opinion had been delivered): The judgment in the case of *Monro v. Ross* \*, which was argued a short time back at your Lordships' bar, in the presence of a noble and learned Earl, who, on account of the importance of the case, assisted in your Lordships'

\* Ante, Vol. vi. N. S. p. 468.

deliberations, was postponed for the purpose of affording an opportunity to your Lordships of hearing the opinion of the Judges in this case, which the Lord Chief Baron has now pronounced. It will be convenient that we should finally dispose of these two cases at the same time, and in the presence of the noble and learned Earl to whom I have referred. I beg leave to return our thanks to the learned Judges for the attention which they have been so good as to bestow upon this very important question.

It was afterwards moved by Lord Lauderdale that further questions should be put to the Judges, and they were summoned to attend accordingly.

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*The Lord Chancellor.* — As the learned Judges July 11. 1830. are attending here in consequence of its being proposed that certain questions should be submitted to them, if it is convenient to my noble friend to submit those questions now, the Judges may be deliberating upon them.

*The Earl of Lauderdale.* — In order that your Lordships may be able to come to a right determination with respect to the bearing of the law of England, upon that very important subject which falls for deliberation in the case of *Doe v. Vardill*; there are some additional questions which I think it necessary to propose to the learned Judges. In framing those questions, I am desirous of abstaining from any thing which involves a consideration on the law of Scotland, because, I apprehend that the Judges in England are not to answer as to the law of any other country than England; and it will not be proper in us to put any question that in the smallest degree involves a consideration of

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the law of Scotland, for which reason in framing those questions, right or wrong, I have carefully abstained from inquiring what is the law of Scotland, and ask only their opinion upon what would be the law of England, that which is stated being the state of the law of Scotland. I was the more anxious to put these questions because I may fairly say that the questions as put by this House, appear to me, upon considering them, to be in themselves contradictory, and in one part to assume that which we have no right to assume, that is, to assume a statement of that as the law of Scotland, which I for one cannot subscribe to as being the law of Scotland. I wish just to state to your Lordships very shortly how that appears. The question put by your Lordships' House is to this effect: "A. "went from England to Scotland, and resided and "was domiciled there, and so continued for many "years, till the time of his death. A. cohabited with "M. an unmarried woman during the whole period "of his residence in Scotland." Now what was the period of his residence in Scotland? It was the period which elapsed between the time of arrival, and the time of his death; it appears by the question, that he cohabited with a woman who was an unmarried woman during all this period; if that was so, there would be no doubt in any country that the child so born must have been, to all intents and purposes, an illegitimate child. It proceeds, "and had by her a son B. who was born "in Scotland." Now, if she, an unmarried woman, cohabited with him all that time, it is impossible to say that the child could be born in marriage.

When we proceed we find, however, though he

cohabited with her during all that period, to the time of his death, in the subsequent part it is stated, "Several years after the birth of B., who "was the only son, A. and M. were married in "Scotland, according to the laws of that country." Now the statement that they were married several years after in Scotland, is a proposition, the validity of which, I cannot easily admit, but it is said, "By the law of Scotland, if the marriage of a "mother of a child with the father of such child, "takes place in Scotland, such child born in Scotland before the marriage, is equally legitimate "with children born after the marriage." My Lords, I hold that this, a statement of the law which is incorrect, is the very question in discussion under the law of Scotland. I contend that the law of Scotland considers the contract of marriage under such circumstances to have taken place before the procreation of the child. When, therefore, your Lordships say that the child was born before marriage, you are making a statement that defeats the law of Scotland, and gives in effect to the learned Judges a different impression of the case from that which a full knowledge of the law of Scotland would give them. My Lords, I could enlarge upon this, if necessary; but as I am most anxious to save your Lordships' time I will simply read the question, which as I apprehend would bring before your Lordships and to your knowledge a more distinct view of the law of Scotland upon this subject.

In the first question I should propose to have stated by your Lordships, I will assume as nearly as I can the words of one of the most distinguished Judges this country ever saw, I mean

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Lord Stowell. 1. “ If the fact of the legitimacy  
 “ or illegitimacy of a native of Scotland is at issue  
 “ in the Courts of Law in England, is it or is it  
 “ not a principle of the law of that country, that  
 “ in judging whether he was born in *justis nuptiis*  
 “ it (the law of England) withdraws and leaves that  
 “ legal question to the exclusive judgment of the  
 “ law of Scotland, where his parents are *domiciled*,  
 “ where the alleged marriage took place, and  
 “ where he was born ? ”

The next question which I shall propose to put  
 to the learned Judges is this : — 2. “ If in the judg-  
 “ ment of the law of Scotland, a native of that  
 “ country is born in *justis nuptiis*, does or does  
 “ not the law of England, from that comity esta-  
 “ blished by international law, hold him to be  
 “ possessed of every right which an Englishman  
 “ born in *justis nuptiis* enjoys ; and independent  
 “ of every view of international law, must or must  
 “ he not in law be deemed to enjoy such rights,  
 “ under the fourth and twenty-fifth articles of the  
 “ Union betwixt England and Scotland, approved  
 “ of and confirmed by the parliaments of both  
 “ countries, the former of which provides that there  
 “ shall be a communication of all rights, privileges  
 “ and advantages, which do or may belong to the  
 “ subjects of either kingdom, except when it is  
 “ otherwise expressly agreed in these articles, and  
 “ the latter of which provides that all laws and  
 “ statutes in either kingdom, so far as they are con-  
 “ trary to or inconsistent with the terms of these  
 “ articles or any of them, shall from and after the  
 “ Union cease and become void, and shall be so de-  
 “ clared to be by the respective parliaments of the  
 “ same kingdoms ? ”

3. The third question is calculated to bring before your Lordships the opinion of the Judges, in a case which bears directly upon that question; it is in this shape. "A., a native of Scotland, domiciled in that country, where he possessed a landed property, lived with a female B., by whom he had two children C. and D. Some years after the birth of these children A. went through a ceremony of marriage." (I cautiously avoid saying that A. was married and refer to the ceremony of marriage, it being a proposition disputed under the law of Scotland, whether that ceremony of marriage has the effect of establishing a matrimony antecedent to that period, or whether the marriage was only from the moment of the ceremony of marriage with B., by which, according to the law of Scotland, C. and D. undoubtedly became legitimate at the death of the father A.) "C., the eldest son, inherited his estates in Scotland, and some years afterwards purchased freehold estates in England. C. afterwards died intestate, leaving no children. His legitimate brother D. inherited his estates in Scotland, and was regularly served heir to them. D. also claims the freehold estates in England of which his brother died possessed, on the ground that he is the nearest heir to his brother C. In opposition to this claim it is asserted, that D., though the legitimate brother of C., cannot inherit his English estates, because, though the law of Scotland holds that the ceremony of marriage which took place is only evidence of that consent which constitutes marriage having been given before the birth of C. and D., and therefore regards them as being born in lawful wedlock, the law of England considers the fact that they were born before the marriage cere-

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mony, and therefore, though it admits their legitimacy, holds that they cannot inherit. By the law of England must or must not this question be decided according to the law of Scotland, where these two children were born, where the marriage ceremony took place, and where the parties were domiciled: and if it is to be decided by the law of Scotland, assuming that the law of that country is here accurately stated, does it not follow that C. and D. being born in *justis nuptiis* according to the law of that country D. has a right to inherit the lands in England of which his brother C. died possessed?"

The next question which I propose, is for the purpose of bringing before your Lordships' House a view of what would be the consequences with regard to the personal estate, and that I hold essentially important; because your Lordships well know leasehold property by the law of this country is of the nature of personal estate. The question is in these words. 4. "A., a domiciled Scotsman, possessed of estates in that country, cohabited with B., by whom he had a son, C.; some years after which a marriage ceremony passed betwixt him and B., which, according to the law of that country, furnished evidence of that mutual consent having taken place antecedent to the birth of C. which constitutes marriage, and gave to his son C. the *status* of a son born in lawful wedlock. A. some years after this marriage retired to England, and acquired a domicile there, when he became possessed of a large personal estate; at the death of A., C. was served heir to the Scotch landed property. Is he, or is he not also entitled to the personal estate in England, consisting of leasehold

and funded property of which his father, supposed to be a domiciled Englishman, at the time of his death died possessed?"

The fifth question which I wish to propose to the learned Judges is, 5. "A., an unmarried man, went from England to Scotland, where he acquired landed property, resided, and was domiciled for many years; soon after his arrival in that country, he formed a connection with a female M., with whom he lived, and by whom he had a son B.; some years after the birth of this child, a regular marriage ceremony, according to the forms prescribed by the law of that country, took place betwixt A. and M. Assuming, as is laid down by all the great authorities who have written on the law of Scotland, that B. in consequence of this ceremony is held to be legitimate by a presumption or fiction of law, that the marriage had taken place betwixt his parents before he was born, or, in other words, assuming that the ceremony of marriage which so took place, is by the law of Scotland regarded as evidence that before the procreation of B., that mutual consent to marry had passed betwixt A. and M., which the law of that country regards as constituting marriage, and that he is therefore held to have been born in *justis nuptiis*, and as such was in truth served heir to the landed property in Scotland, in which his father died intestate: "under such assumption the learned Judges are requested to say whether B. is, or is not, entitled as the heir of A., to the real estate in England, of which A. dying intestate was seised?"

I believe it to be the regular practice of your Lordships' House, that we ask not only for information with regard to the law, but information with regard

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to the practice of the Courts, and the two last questions I shall propose have reference to these two subjects; first, —

“Is there any case in which, under the law of England, an only son, whose legitimacy is admitted, is nevertheless debarred from inheriting landed property, of which his father dying intestate was possessed?”

The last question is proposed on the supposition that there are such cases, and requests information upon the subject matter to this effect.

“If such case or cases exist, the learned Judges are desired to give to the House references to the authorities and by whom they are reported, and to state the principles of law on which such judgments proceeded.”

Those questions may perhaps be considered as somewhat long, but on considering the subject, I really did not think I was capable of getting that information, which your Lordships ought to have, before you proceeded to decide this important case, in shorter terms; and it is a case of the utmost importance, not only to the Lieges, but to your Lordships' House, when you consider how seriously it might affect some members of your Lordships' House. There are in this House many Peers with titles of honour, by which they had the good fortune to be relieved from all question as to their hereditary honours as Peers of Scotland; but your Lordships will recollect that, upon the decision of this question, may depend whether those hereditary honours may be left without any one to represent them, or with an uncertainty who that individual shall be, whether a particular individual is the legitimate son, who, by

the law of Scotland, shall inherit the Scotch honours and the entailed Scotch estates. I own, my Lords, that this view of the question, in my opinion, adds greatly to the importance of it, and greatly to the necessity of your Lordships' house obtaining all the information which it is possible to obtain, before you proceed to decide upon so important a case.

*Lord Chancellor.*—My noble friend, according to his own statement, need not entertain the apprehension which he expresses in the last part of his address to the House; my noble friend has stated that, upon the face of this special verdict, the law of Scotland has been misrepresented, but a misstatement of the law of Scotland, upon the face of this special verdict, cannot, I think, lead to the conclusion my noble friend apprehends. I cannot help imagining that the motion which my noble friend has made, is founded altogether on misapprehension of the state of this record, and the effect of it, and it is necessary that I should state to your Lordships what is the course of proceeding in which the question is presented to your Lordships. This is a question upon a special verdict: the law of Scotland is a question of fact; the law of Scotland was found in the Court below, or supposed to be found by the verdict of a jury. The moment that question of fact was decided by the verdict of a jury, and formed a part of the special verdict, the Court below was called upon to draw the conclusion of law from the finding, right or wrong, contained in that special verdict. The Court below had no power after that special verdict was formed to new model it; if that were to be done, it would have been necessary the case should have

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gone down again for the jury to find the fact, if there had been any suggestion of error in point of fact; but the fact being assumed, right or wrong, the Court of King's Bench was called upon to pronounce as to the conclusion of law upon that state of facts. It was suggested that the conclusion of the Court below, being a conclusion in point of law upon that assumption of facts, was erroneous, and in consequence of that, a writ of error being brought into your Lordships' House, I apprehend there is no power in this state of the proceedings to inquire into the fact; your Lordships have no power to inquire what is the law of Scotland, if the law of Scotland is stated upon the record; and the question is, supposing the law as found to be correctly stated, whether the opinion of the learned Judges stated in the Court below, was, upon the assumption of the facts there stated, a correct one.

Now I should wish to know what course of proceeding my noble friend recommends. If I understand the matter rightly, he recommends that the whole should be set aside, and that the fact should be found again. I ask, whether such a course of proceeding was ever suggested before in a case brought into your Lordships' House. It will be conferring great obligations on your Lordships, if my noble and learned friend who has had so much experience in this House will state whether on the mere supposition that the fact has been incorrectly found, it has been the course of your Lordships' House to award *a venire de novo*. If it has, I shall acquiesce in that being done; but I apprehend no other course can be adopted except *a venire de novo*, that the subject may go down again, and that the jury

may find what is the law of Scotland. A case which comes here by writ of error must be decided according to English law: and whenever we are called upon to inquire in an English Court of Justice what is the law of Scotland, that must be inquired into as a matter of fact, the fact being itself examined into before a jury for the purpose of ascertaining the law. If my noble and learned friend, whose valuable assistance we have, is aware that in such cases your Lordships' House has ever upon a writ of error directed *a venire de novo*, on a supposition that the fact found by the jury in the Court below has been incorrectly founded in point of fact, I shall acquiesce in such a suggestion. With respect to the form of the question, the only criticism which my noble friend has made is a criticism of this nature; that there is a sort of inconsistency in supposing that a husband cohabits with his wife. It is stated that, during the whole time they cohabited as man and wife, part of the time without being married and the rest of the period being married. I always imagined that a man might cohabit with his wife. I should be very glad to hear the opinion of my noble and learned friend who has had so much experience in this House, whether the course which is suggested can be adopted. I will merely remark, that no inconvenience can result from this case; that it concludes no right; it is a mere question of ejectment founded on a particular state of facts. If facts are found to be erroneous a second ejectment may be brought, and this finding will conclude no question between the parties.

*The Earl of Eldon.*—My noble and learned

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friend having put a question with reference to my recollection, whether this House has awarded a *venire de novo*, I would merely state that without further consideration I cannot take upon myself to say whether a *venire de novo* has been awarded; but I think it has in a case in which the facts were not stated with sufficient clearness to enable your Lordships to decide the case. I do not call to mind the circumstances of that case, and am not able to say whether the House has directed a *venire de novo* in the circumstances stated by my noble and learned friend, but I will look into the cases upon the subject.

*Lord Wynford.* — I certainly would not presume without further consideration, to recommend to your Lordships under the circumstances, to award a *venire de novo* for the purpose of correcting the statement as to the law of Scotland. I however, do recollect a case, in which it was under consideration, whether a *venire de novo* should not be granted, a case from Ireland where there were facts very incorrectly stated, and where it was discussed whether a *venire de novo* should not be sent; but on further consideration, it was thought better to dispose of the case as it stood, and it was so disposed of; but when I find my noble friend state, that in the opinion of those conversant with the law of Scotland, a fact so very important is incorrectly found in the special verdict, I am bound to say, I do not think this case can be satisfactorily decided without giving this House the opportunity of considering the legal effect of that finding by the special verdict.

There is one question, however, which has been put by my noble friend, upon which I feel some doubt. I have been conversant with the practice of

the law now for nearly thirty-two years, and I never remember a similar question being put. The last question put by my noble friend is this, What is your opinion on matters of law, and will you state the cases and ground of your opinion? I will venture to say that such a question was never put before. When your Lordships put questions to Judges you ask them to state their opinions, and they add so much as they feel to be necessary to fortify their opinions, but you do not ask them to state more than they deem to be requisite.

*The Earl of Eldon.* — My Lords, I believe it will be found that this House has awarded a *venire de novo* in Lord Jersey's case, and I think there was also a *venire de novo* awarded in the case of Commodore Johnstone.

*The Lord Chancellor.* — I am not at present apprized of the circumstances of those cases, but, in the case stated by my noble and learned friend, probably the special verdict was imperfectly framed; if so, there must be a *venire de novo*; but I believe that where the fact is found distinctly, whether that finding is right or wrong, a Court of Error never directs a *venire de novo*. I do not state any thing as to the power of your Lordships' sitting as a Court of Error. With reference to that which fell from my noble friend, as to the statement of the law of Scotland, in the question to the learned Judges, I had but one course to pursue; I had no alternative but to state the law of Scotland as I found it in the special verdict. The judgment of this House must proceed upon the statement of facts to be found in the special verdict, and if the jury have stated it deficiently, the parties have got

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a judgment which will be of no use beyond that of deciding the particular case.

*Lord Wynford.* — Your Lordships will excuse my setting myself right, for it appears to me that there is an inconsistency in this special verdict which puts an end to the question; it finds the parties cohabiting together, the birth of the child, and then after that birth a marriage, not describing it as a ceremony of marriage, but a marriage subsequent to the birth of the child. Now in Scotland the presumption is from the ceremony taking place to-day, that there had been an actual marriage twenty years before, or so long before as is necessary to render the child legitimate, and yet in the same special verdict it is found that this child would, in consequence of a subsequent marriage, be a legitimate child, the parents being *domiciled* in Scotland. If there is an apparent inconsistency on the face of the special verdict which stands in the way of justice, it appears to me that the matter should be put into a course by which the inconsistency can be removed; it is necessary, stating the birth of the child at such a time, to state that there was a ceremony of marriage. I cannot, therefore, distinguish between this case and the cases alluded to, the facts being so stated that there is an apparent inconsistency, so that no proper inference of law can be drawn from the facts.

*The Lord Chancellor.* — There is no doubt that the law of Scotland is inadequately and imperfectly stated, and I may admit for the purposes of the argument that it is incorrectly stated; still I apprehend we cannot go out of the record. There does not appear to be any imperfection in the finding.

It is the finding of the Jury, and we have no right to investigate the fact, unless it is so imperfectly stated that you can come to no conclusion upon such a statement. But I should submit to your Lordships, that from the very involved and complicated nature of the questions my noble friend has suggested, the better course will be in the first instance to have those questions printed, and to name a day for taking them into consideration. I feel myself incompetent on a sudden to follow my noble friend though this involved statement, and the inferences to which they may lead me in reference to the questions to be put to the Judges. I am not for limiting my noble friend very closely, but we should see the effect of those questions.

*Earl of Lauderdale.* — I have not the least objection; the matter ought to be most fully considered, for it is desirable the public and your Lordships should see how far this is a correct statement of the law of Scotland. It does not in my opinion state the whole of the law of Scotland, and it does not give to the House that view which is satisfactory, and which can lead to any proper result.

*The Lord Chancellor.* — Perhaps it may be advisable also to suggest to the Judges questions whether in a Court of Error, in the Courts of Common Law of England, where the fact is incorrectly stated they have known a *venire de novo* awarded, that might assist us in directing your Lordships' proceedings. I admit to my noble friend that the law of Scotland is imperfectly stated upon this record, and perhaps incorrectly stated; but the House cannot call upon the learned Judges to decide upon the question as to

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the law of Scotland except as it is proved : they are not assumed to have any knowledge of the law of Scotland.

*The Earl of Lauderdale.*—I have no objection to the noble and learned Lord putting that question, stating it to refer to a case where the law of Scotland is imperfectly as well as incorrectly stated.

*The Lord Chancellor.*—It must appear upon the face of the record itself from circumstances in the record to be imperfect. A suggestion *dehors* that the record is imperfect, is inadmissible ; and when we are sitting here upon a writ of error from one of our Courts of Justice, we are sitting as an English and not as a Scotch tribunal.

*Lord Wynford.*—I should propose to add another question, whether, if on a record as it is presented to the Court of Error justice cannot be done, a writ of *venire de novo* should not be issued ?

*The Lord Chancellor.*—My noble and learned friend I am sure will not desire to import facts *dehors* the record for the purpose of coming to the conclusion that justice cannot be done.

*Lord Wynford.*—I do not desire to go out of the record, but I put it on the apparent imperfections of the record.

The further consideration of the case was then adjourned.

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At the close of the session, 1834, the case was brought on for further consideration, when the following opinions were delivered :—

*Lord Brougham.*—The extreme importance of the question raised by this special verdict has occasioned more than ordinary delay in giving judgment.

The facts of the case, as they appear on the special verdict, are these: Alexander Birtwhistle, being seized of a freehold estate in Yorkshire, was domiciled in Scotland from the year 1790, nineteen years before the estate descended to him. He cohabited there with Mary Purdie, a Scotchwoman, by whom he had a son, John Birtwhistle, the lessor of the Plaintiff, who was born in Scotland in 1799, and six years after his birth his father and mother intermarried. In 1810 Alexander died in Scotland, whence he never had removed, and John succeeded to his Scotch estates; being by the Scotch law legitimate, in consequence of the marriage of his parents subsequent to his birth, and without anything intervening between the birth of the child and the marriage of the parents, which could have prevented them from contracting a marriage at any moment. The question is, whether or not he also takes the English real estate as heir to his father deceased?

In approaching this question, there are some things not disputed. It is admitted, that the validity of a marriage must depend on the law of the country where it is had, and that consequently the parents of this party were validly married. It seems also to be agreed, that generally speaking legitimacy is a *status*, and must be determined by the law of the country to which the party belongs. But it is said by those who support this judgment, that whether the party here is legitimate or not, is no question before us; the only question being, it is alleged, whether or not he is the heir to an English real estate. This distinction, I confess, appears to me founded on an inaccurate view of the subject. It is true, that the question here

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arises upon the claim of an heir as such, and that therefore the only question may be said to be, whether he is heir or not. But it is also very possible that this question may turn wholly upon another, namely, whether or not the claimant is eldest legitimate son of his father, the person last seized? Nor do I well see how legitimacy can ever come in question in any other way than as connected with the claim to succession, either real or personal, in England, or in Scotland either, unless in the single case of a declarator of bastardy or of legitimacy — a proceeding unknown in the English law. It is therefore by no means sufficient for deciding this case to say, that the question touches not legitimacy but inheritance; not the personal *status* of the party, but his right to real property. It may touch both these matters, and the latter may wholly depend upon the former.

In truth, legitimate son means lawful son; and the rule of inheritance is, that the eldest lawful son shall succeed to the father: but "*lawful or not*" depends upon the law which is to govern; and no other definition can be given of what is lawful than this, that he is lawful son whom the law declares to be such. What law? There are two, it is said, in this case — the law of the place of the party's birth, and of his parents' marriage, and the law of the place where the land lies. Then which of these two laws shall prevail? The whole inclination of every one's mind must be towards that law which prevails where each person is born, and where his parents were married, supposing the countries to be one and the same; and if they differ, I should then say certainly the law of the birth-place. Nor can any thing be more

inconvenient or more inconsistent with principle, than the inevitable consequence of taking the *lex loci rei sitæ* for the rule; because this makes a man legitimate or illegitimate, according to the place where his property lies or rights come in question — legitimate when he sues for distribution of personal estate — a bastard when he sues for succession to real; nay, legitimate in one country where part of his land may lie — and a bastard in some other where he has the residue. So, in like manner, all who claim through him must have their rights determined by the same vague and uncertain canon — a circumstance which I nowhere find adverted to below. All the learned Judges proceed upon the case being one of an inheritance claimed by the party himself. But what if he were dead years ago, and another claimed an estate in England to which he (the alleged bastard) never had been, and never could have been entitled, an estate, for example, descending from a collateral who took it by purchase after the death of the alleged bastard? Then the pedigree of the claimant must be made out through legitimate persons; and the question of legitimacy is raised as to one who is not himself claiming any land — who never did or could claim any land — and it is not raised in respect of any right in him to inherit — any right to be called the heir to any land. I apprehend this shows strongly the necessity of taking another view than the learned Judges seem to have deemed sufficient for getting over the difficulty of the case; and of admitting that there is a *status* of legitimacy, which is personal, and, travelling about with the individual, must be determined by the law of his country.

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In the argument for the judgment below it is thought enough to say, that heir means he who is born in lawful wedlock — *ex justis nuptiis*. Then what is lawful wedlock? Is there any greater reason for being bound by the law of the country where the marriage-contract was made in deciding whether or not the wedlock was lawful, than there is for being governed in ascertaining the legitimacy of the issue of the marriage by the law of the country where that issue was born, more especially when it was also the country where the marriage was had? But can the Court stop short according to its own principle, at the mere fact of the marriage being according to the *lex loci contractus*? Do not the principles on which their decision proceeds demand this further inquiry — Were the parties able to marry by the *lex loci rei sitæ*? and thus a door is opened to the further examination of how far a preceding divorce of one of the parties was sufficient to dissolve a previous English marriage. All such difficulties are got rid of by holding the *lex loci contractus* and *nativitatis* as governing the validity of the contract and legitimacy of its issue; but they are not to be got over in this way by any argument which does not with equal force apply to holding that the legitimacy of the issue is a question equally to be governed by the *lex loci contractus* and the law of the birth-place.

Nor is it correct to say, as the Judges below assumed, that the *lex loci* only influences the validity of the contract, and extends not to its effects. The highest authorities have held expressly the reverse. Huber, in the Treatise *De Conflictu Legum*, which forms part of his larger work, and

is constantly cited as the greatest authority on this question, says, “Non solum ipsi contractus ipsæ-  
 “que nuptiæ certis locis rite celebratæ ubique pro  
 “justis et validis habentur, *sed etiam jura et effec-*  
 “*tus* contractum nuptiarumque in iis locis recepta  
 “*ubique* vim suam obtinebunt.” I. 3, 9. It would  
 be difficult to state anything more clearly and properly the effect of the matrimonial contract, than the legitimacy of the issue; it is, in fact, the main object, and therefore the principal effect of that contract. But to remove all doubt on this subject, and to extend the same rule also to the *lex loci nativitatis* — he adds, “Qualitates personales certo  
 “loco alicui impressas ubique circumferri et per-  
 “sonam comitari, cum hoc effectu ut *ubivis loco-*  
 “*rum* eo jure quo tales personæ *alibi* gaudent vel  
 “subjecti sunt, gaudeantur et subjiciantur.”

This principle was adopted and acted on in two very remarkable cases by your Lordships then proceeding under the advice of Lord Eldon, — I mean *Crawford v. Patrick*, and *Strathmore v. Bowes*. In the former, a child having been born before marriage in America, where the English law prevails, claimed a Scotch estate in respect of the subsequent marriage of his parents there, *of whom the father was Scotch*. He contended, that the question having arisen upon a real estate in Scotland, the Court of Session was bound to administer the law *loci rei sitæ*, and that law declared him legitimate. But the Court below and your Lordships held that legitimacy is a *status* to be determined by the law of the party's birth-place, or at any rate, by that of the country where the marriage of his parents was had, as well as himself born; and they held him bastard in Scotland

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where the land lay, because he was bastard in America, where his birth and his parents' marriage took place. In *Strathmore v. Bowes*, a marriage had in London after the birth of the child was held not to legitimate the issue either as to Scotch honours or estate on the same grounds; and in both these cases one of the points made for the judgment was the absurdity of holding the same person to be bastard in one country and legitimate in another.

It is plain that legitimacy has but one meaning, namely, born in lawful wedlock. Now in Scotland the child born before the marriage ceremony has been performed is legitimate, not because of a subsequent act of his parents, but because he is considered as born in lawful wedlock. The marriage is held to have preceded his birth, and according to the doctrine and language of the civil law, from which Scotland and other countries have borrowed this principle, he is considered as *non legitimatus, sed legitimus ab initio*. Nor is this a mere fiction of law and a technical refinement. Marriage in Scotland is a *consensual* contract, and perfected by consent alone. But this may be given, and the contract made in two ways, either *per verba de præsenti*, or by a promise *subsequente copulâ*. Now in the latter case, the *copula* makes the previous promise a consent—it turns the promise touching the future into a present consent. A child then, born in the interval between the promise and the *copula*, would be legitimate, for the *copula* would show that consent, and therefore a marriage had preceded his birth. But so does a marriage after the birth, for that raises the legal presumption that there was a consent before the

birth and at the cohabitation. The cohabitation is held to have been a consent and a marriage; the ceremony is only held as evidence of that previous consent and contract. So much is this the case, that if either party was married to another at the time of the child's birth, or during the interval between that birth and the ceremony, no legitimation takes place, because no room exists for the presumption of law that the consent or marriage took place before the birth. All this is certain and clear, but the learned Judges in the Court below appear not to have taken it into their consideration.

The judgment is rested entirely upon the *statute of Merton*, and it is contended that, by that famous Act, he is declared a bastard who is born before the marriage of his parents: no doubt so he is in England; and no doubt bastardy—the *status* of bastardy—is what the English law is there dealing with. But is this an authority for saying that he only shall inherit English lands whom that statute declares legitimate?

It is said that the *lex loci rei sitæ* must govern the succession to real estate; undoubtedly it must; and if that law gives it in Kent to all the sons, and in Brentford to the youngest, and elsewhere to the eldest, these several sons are the heirs in those several places. But when it is said the lawful issue shall take—I agree—I too say only the legitimate son or sons shall inherit; but to find who are the legitimate sons, I must ask the law of the birth-place which fixes the *status* of legitimacy; of the personal quality, according to Huber, that travels round every where with the party. But the argument assumes a narrower and appa-

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rently closer form still, for it is said that the statute declares those only inheritable who are born in marriage, and that Lord Coke accordingly defines the heir to be, him who is *ex justis nuptiis procreatus*. There is in this however a great fallacy: "Born in marriage" or not — "*ex justis nuptiis procreatus*" — or not — is to be determined by some law or other; it is not a question that answers itself and in one way only. Then what law shall determine? Certainly either the law of the country where the party was born, or where the marriage was had; the law either of the country where the *nuptiæ* were had, or where the *procreatio* took place. A question might arise, where the events happened in different countries — it might then be doubted which law should govern — which should be resorted to for an answer to the question. But where both events happened in the same country, as here, there seems no doubt at all in the matter. Now the law of the country where both the marriage and the birth took place, declares that the party was born in lawful wedlock; that he was *ex justis nuptiis procreatus*; and wholly denies that he was born before marriage or out of wedlock.

But it is said that this is a fiction, and that our law cannot import the fictions of a foreign system, though its principles we are allowed to import. This distinction I do not profess to comprehend; what is a fiction but a principle? It is only one particular view which the law takes, and one doctrine which it lays down. Suppose a Scotch Court were to deny the legitimacy of a child who was born on the day after his parents married in England, should we not say that a gross absurdity was committed? Should we not say the child was

born in lawful wedlock, and hold the doctrine absurd which should question his being lawfully begotten? Nay, suppose a gift in the usual terms, to the heirs of the body lawfully begotten; we should let the child born the day after marriage take under such a gift, although it was clearly not lawfully begotten in point of fact. This is a fiction exactly analogous to the Scotch fiction. The Scotch law presumes, against the fact, the marriage to have been had before the birth of the child; our law presumes, against the fact, the marriage to have been had before the cohabitation of the parents: the fiction or rather presumption is parcel of the legal principle in both, and there can be no reason for importing the residue of the doctrine and rejecting the presumption; there can be no reason for importing the English law presumption into Scotland, which does not justify and require us to import the Scotch law presumption into England.

It must be recollected, too, that the special verdict finds as a fact the legitimacy of the party, and not his legitimation; it finds as a fact that he is legitimate; that is to say, lawfully born. Now we know this to mean by the Scotch law, born in lawful wedlock; but the finding in the verdict is sufficient; for legitimate, as contradistinguished from legitimated, means born in lawful wedlock, and can mean nothing else. So in the civil law, from whence this doctrine is wholly taken, both in Scotland and Holland and other countries, the child is *legitimus*, not *legitimus*, as in the same system of jurisprudence, *liber* is a free man, *libertinus*, one of the condition of a freed man, *ingenuus*, one free born. If any person were found to be

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*ingenuus* by an inquisition, we should contend that he never had been a slave, though a finding of *liber* might leave it equivocal. In like manner and by parity of reason, a person being found legitimate, or *legitimus*, and not legitimated or *legitimatus*, excludes the supposition of his ever having been a bastard, and shows him to be lawfully born and begotten. Suppose a Scotch estate devolved to one born before marriage, as it might by devise (or rather Scotch conveyance in the nature of devise) to the first son of A., I apprehend that A. marrying the mother the day after the devisor's death, the estate would be vested in the son, because he would become legitimate, though born before the death. But it is unnecessary to argue this, though it illustrates the principle; the fact found is, that the lessor of the plaintiff was born in Scotland legitimate, or in lawful wedlock.

The cases of *Crawford v. Patrick* and *Strathmore v. Bowes* have been already referred to, but they require another remark. They were decided in this House, by appeal it is true from Scotland, and respecting the Scotch real estate, but still by this House, and upon general principles of law. Those cases were the precise converse of this: they decided the bastardy of parties, and on the distinct ground that, as Lord Redesdale said, they were "bastard by the law of their birth-place, and therefore bastard in Scotland where the rights claimed respected real estate." It is not more the rule of the English law that children born out of wedlock shall not inherit, though their parents intermarry, than it is the rule of the Scotch law that such children shall inherit, if their parents do

intermarry. It is not more alien to the English law to adopt the fiction that such children are born in wedlock, than it is alien to the Scotch law to exclude this principle. The English rule being statutory can make no difference. A fixed and known principle of common law has exactly the same force with statutory provision. How then can the opposite principle be adopted in two cases identically the same? The Court below says that the English law gives not an estate to the bastard *eigne*, and that it treats him as bastard, although by the law of his birth-place he was legitimate. The Scotch law gives the estate to the bastard *eigne*, regarding him as legitimate, and this House adjudged that he should not take that estate, only because he was illegitimate by the law of his birth-place. Your Lordships decided that the *lex loci rei sitæ* should not be regarded, when it differed from the *lex loci contractus et nativitatis*; you decided that, when the former law declared for legitimacy, it should yield to the latter, which declared for bastardy. How can you be called upon here to decide that the *lex loci rei sitæ* shall not overrule the other law, and that again in favour of bastardy? I profess my inability to understand how these two decisions of the same question can in any way stand together; nor am I able to perceive that the least attention was paid by the Court below to those important decisions of your Lordships.

I perceive that the whole argument in that Court turned upon a question not in dispute here. The learned Judges suppose that they decide the question, when they prove that the English law is to govern the case, because the question relates

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to real property situated in England. Now undeniably the English law is to govern the case in one sense; the eldest lawful son is to succeed; but who that son is must be determined by the law of his birth-place, and by the fact found. that, under that law, the lessor of the plaintiff is eldest lawful son. Nay even if we take the English law to be, that lawful son or heir is he who was born in wedlock, then we have here the fact found, and found as a fact, that in the country where he was born the party was born in wedlock. No one, it must be always borne in mind, pretends to say that the English law can in any way dispose of the whole question. Admitting that the rule cited from Lord Coke in reference to the *statute of Merton* is to govern us, *hæres qui ex justis nuptiis procreatus est*, no one contends that the question what are *justæ nuptiæ* can be determined otherwise than by a reference to the *lex loci contractus*, or it may be, *loci natalitatis*. To that foreign law, then, we must resort; and the only question is, at what period of our inquiry this recourse shall be had. No more needs be said to show how very far from decisive of the present question that position is, which alone is argued or defended by the learned Judges, namely, that the law of England must govern. It does govern, but with the aid, through the ministry of the foreign law. The reference made to the *dictum* of the Master of the Rolls in *Brodie v. Barry* \*, B. does not touch the case. All that his Honour there said was, that questions on real rights must follow the law of the country where the land lies. This is not denied; nor was it denied by this House, when it refused to consider W. Sheddon or J. Bowes as legitimate in respect to Scotch Es-

\* 2 Ves. and Bea. p. 127.

tates, although the law of Scotland where those estates lay held them both to be so; or rather would so have held had they been born in Scotland. But while this House and the Court of Session admitted that the Scotch law must decide, they also held that the Scotch law refused estate to bastards, and that it regarded one as a bastard who was so by the law of his birth-place. That was the same case in principle with this, in every material respect.

It is not easy in such a question, a question raised on the *conflictus legum*, to omit all considerations of convenience; inasmuch as it is principally on views of convenience that the whole doctrine of what is generally called *comitas* turns. One should say that nothing can be more pregnant with inconvenience, nay, that nothing can lead to consequences more strange in statement, than a doctrine which sets out with assuming legitimacy to be not a personal *status*, but a relation to the several countries in which rights are claimed, and indeed to the nature of different rights. That a man may be bastard in one country, and legitimate in another, seems of itself a strong position to affirm, but more staggering when it is followed up by this other, that in one and the same country he is to be regarded as bastard when he comes into one court to claim an estate in land, and legitimate when he resorts to another to obtain personal succession; nay, that the same Court of Equity (when the real estate happens to be impressed with a trust) must view him as both bastard and legitimate, in respect of a succession to the same intestate. Further still, should he happen to be next of kin to his uncle, who had a mortgage upon the estate, he must be denied his succession to the land of the mortgagor

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in his quality of bastard, and be allowed to come in as an incumbrancer upon the self-same estate in his capacity of legitimate son to the same mortgagor. All this is assumed to be the law by the learned Judges who have decided below, and advised your Lordships here. They have not assumed, what however they cannot deny, that it is another consequence of their doctrine, to enable a descendant of this same bastard to claim through him as if he were legitimate, while the alleged force of the *statute of Merton* and of Lord Coke's commentary thereupon, excludes him from taking it himself. In the same country, in the same Courts, in respect to the same land, he is both bastard and legitimate; bastard for the purpose of his own succession, legitimate when the succession of others is concerned. May I be permitted most respectfully to express a doubt whether or not this question has received all the consideration which it deserves at the hand of those learned Judges?

I know not that it carries the argument much further, but there is a proceeding well known to your Lordships sitting here as a Court of general jurisdiction over the whole United Kingdom, though unknown to the Courts of England, — the process of declarator. Suppose a declarator of legitimacy had been brought in the Scotch Courts by the lessor of this plaintiff, the judgment would have been, and quite as a matter of course, that he was lawful son of Wm. Birtwhistle; and the present defendant being made a party to this suit, the judgment could be given in evidence before the Court where the ejectment now before us was brought. I agree that such a judgment does not conclusively bind; yet it would place the conflict

of the two laws in a somewhat stronger light, if the English Court should pronounce him bastard whom the Scotch Court, sitting in the country of his birth, had pronounced lawful son. But if both judgments were brought here by appeal and writ of error, as might easily happen, your Lordships would be compelled to affirm the sentence of the Scotch Court, and yet you are now asked to affirm the opposite judgment of the King's Bench. Let it be observed, too, that all this anomaly is in England—it begins and ends here; for the Scotch Judges have decided in such cases with perfect consistency, as well as entire uniformity. Those learned persons, whose familiarity with legal principle, in its enlarged sense, is derived from a deep study of the feudal and of the civil law, as well as of the modern jurisprudence of Scotland, have been guided in all their determinations of such questions by simple, rational, and intelligible principles. If a declarator of legitimacy were brought before them by one born in England before marriage, and whose parents afterwards intermarried, their sentence would be that he was illegitimate; and even were he to claim a Scotch estate the law would be the same. This has been ruled in Scotland in the cases more than once referred to, and affirmed upon appeal here. But you are now advised to take a different course, when the same question arises in another part of the United Kingdom. It may be observed that, in referring to those Scotch cases, the learned Chief Justice says, without discussing them, that it is satisfactory to him that the form of the proceeding (a special verdict) was such as to carry the question before the same tribunal which pronounced those decisions. In the advice-

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however, which has been given to this tribunal by the same learned Judges, I do not find that those decisions have been much considered.

I am of opinion therefore, that this case was wrong decided below, and upon views which got rid of the real point, and, escaping to one very easy and quite undisputed, left the only question undecided. With the greatest respect for the learned Judges who gave the same opinion to your Lordships, on the same grounds, I am bound to give my own opinion, although it differs so widely from theirs: and is, therefore, very likely to be wrong. I think that the writ of error ought to be allowed, and the lessor of the plaintiff be found entitled to the *postea*, and to recover. But I think it most probable that your Lordships may desire to have the case re-argued, considering its great importance; and I humbly submit these observations to your Lordships, but more particularly to my noble and learned friend (Lord Lyndhurst) who held the Great Seal at the time when the case was heard.

*Lord Lyndhurst.* — This was a case which arose on the Northern Circuit. For the purpose of raising the question of law for the opinion of the Court of King's Bench, the parties agreed on a special verdict. The question was argued originally at great length and with great learning by the present Lord Chief Justice of the Common Pleas on the one side, and by counsel of great eminence on the other, and the Court of King's Bench were unanimous in their opinion upon the case: however, in consequence of the importance of the question, at the suggestion of the Lord Chief Justice at the time, it was thought to be right to bring the question to your Lordships' House. It

was again argued with great learning at your Lordships' bar. It was very elaborately argued, and the learned Judges unanimously concurred in the decision of the Court of King's Bench. However, my noble and learned friend has stated a doubt with respect to the case: he is of opinion that all the necessary views of the subject were not taken in the argument, and that they were not sufficiently considered by the learned Judges at the time of giving their advice to your Lordships. Under these circumstances I agree with my noble and learned friend, with a view to settling the law upon this subject, and with reference also to the importance of the question, it might be desirable that the case should again be argued by counsel at the bar, in such a way as your Lordships shall direct, in the presence of the learned Judges. That of course must be next Session, as it will be impossible to call them together this Session.

I might say that I think some of the views put by my noble and learned friend are very striking. I have adverted to them myself over and over again in considering the case; they require very full and patient consideration, and no pains should be spared to arrive at the proper result; therefore, I should suggest the course which I believe my noble and learned friend approves, that your Lordships should request the learned Judges to attend here to hear the cause re-argued.

*Lord Brougham.*—My Lords, I am much better pleased that my noble and learned friend should put it as he has done upon his judgment that the questions now raised are worth consideration, than that it should proceed on any doubts entertained by me. I should not think it right that I, who was

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not judicially here when the case was argued, should alone advise your Lordships.

*Lord Denman.* — My Lords, I think the importance of the case is such, and the doubts which exist are so considerable, that they ought to be further investigated before the case is determined by your Lordships.

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Ordered to be further argued before the Judges next Session, by one Counsel on each side.

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## SCOTLAND.

(COURT OF SESSION.)

The Honourable Dame ANNE BOS- }  
 CAWEN OF WARRENDER - - } *Appellant* ;

The Right Honourable Sir GEORGE }  
 WARRENDER, of Lochend, Bart. } *Respondent*.

In 1810 a marriage was solemnized in England between an English woman and W., a Scotchman by birth, property, and connections, but partly domiciled in England. In 1819 a deed was executed, by which they agreed to live separate — the agreement to be rescinded only by mutual consent, and on specified conditions; and a provision for the wife was charged upon the estates of the husband in Scotland. From this time they were in a state of separation, the husband living almost wholly in Scotland. The wife resided on the Continent, chiefly in France.

Upon action by the husband in the Court of Session in Scotland, for a divorce on the ground of adultery, Held that the Court had jurisdiction to pronounce a sentence of divorce, a *Vinculo Matrimonii*.

THE question in this case arose in an action of divorce brought in the Court of Session in Scotland at the instance of Sir George Warrender, against Dame Anne Boscawen or Warrender.

The case stated in the Court below for the pursuer was as follows: —

The pursuer was a native of Scotland. He was born and educated in that country. Descended of Scotch parents, he succeeded to and still possessed

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the family estates of Lochend, in the county of East Lothian. He had likewise purchased landed property in several counties in Scotland, to the extent of between 40,000*l.* and 50,000*l.* Having succeeded, in the year 1820, on the death of his cousin, to the estate of Bruntfield in the immediate vicinity of Edinburgh, he soon afterwards made considerable additions to the mansion-house on it, and fitted it up as a residence for himself, at an expense of about 7000*l.* After that period, he made it his principal residence, and was residing there at the time of the suit.

At an early period in life he obtained a commission in the Berwickshire regiment of militia, with which he did duty both in Scotland and in England, and then held the lieutenant-colonelcy of the regiment.

In 1807 the pursuer was returned to parliament for the Haddington district of burghs, and at a subsequent period, represented in parliament the burghs of Truro, Sandwich, Westbury, and Honiton. About the end of the year 1812 he was appointed to a seat at the Board of Admiralty, and there being an official residence attached to it, he soon afterwards took possession of it, and continued to occupy it till the month of April 1822. Until his appointment to this office, he had no house in London, or elsewhere in England; he kept no establishment there, but lived sometimes in hotels, at other times in furnished lodgings, when his parliamentary duties required his attendance in London. He spent the greater part of his time in Scotland. His residence was there, and he only left it when required by his regimental or parliamentary duties. During the time, indeed, that he held the situation of one

of the Lords of the Admiralty, it became necessary for him to spend a greater part of his time in London; but even then he was in the practice of returning to Scotland every year when the duties of his office permitted.

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During one of his visits to England, in the month of October 1810, and while he was residing in temporary lodgings, he was regularly married to the Defender. The marriage ceremony was performed in London, and the Defender was an English lady, both by birth and connections. Marriage articles, after the English form, were entered into, but the provisions settled upon the Defender as his wife were contained in an antenuptial contract of marriage, executed in the Scotch form, *simul et semel* with the English articles, and were secured over his heritable property in Scotland.

It was provided by that deed, that the Defender should be secured in a jointure of 1000*l.* a year, partly over the estate of Lochend, and partly over the lands of Goodspeed, both situate in the county of Haddington. The deed narrates, "that the said Sir George Warrender and Anne Boscawen having conceived a mutual love and affection for each other, do hereby, with consent foresaid, accept of each other for lawful spouses, and promise to accomplish and solemnise their marriage without delay;" and that the pursuer had covenanted and agreed to "settle 1000*l.* sterling a-year upon her as her jointure, to be secured on his real estates in Scotland; and, in regard that, by the settlements of the estate of Lochend, the heirs of entail and provision succeeding thereto are empowered to provide their ladies in a competent liferent provision, by

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“ way of locality, out of the said estate, not ex-  
 “ ceeding the third part of the real rent thereof  
 “ for the time; therefore, the said Sir George  
 “ Warrender, as a security to the said Anne  
 “ Boscawen, his future spouse, of an annuity of  
 “ 580*l.* sterling, part of the said jointure or annuity  
 “ of 1000*l.* covenanted to be paid to her as afore-  
 “ said, hereby binds and obliges himself, and his  
 “ heirs of entail and provision, and his successors  
 “ and representatives whatever, legally and suffi-  
 “ ciently to infeft and seise the said Anne Boscawen,  
 “ his future spouse, in liferent during all the days  
 “ of her life, after his decease, in case she shall  
 “ happen to survive him: But always with and  
 “ under the reservation, conditions, and provisions  
 “ after written, in all and sundry the lands and  
 “ others specified (the rent whereof is within a  
 “ third part of the rent of the said lands and estate  
 “ of Lochend), viz., the lands and grounds of  
 “ Lochend.”

It farther provides, that besides the foresaid provision, “ by way of locality to the said Anne  
 “ Boscawen, for securing to her the foresaid  
 “ annuity of 580*l.* sterling, part of the said jointure  
 “ or annuity of 1000*l.* agreed to be secured to her  
 “ upon the said Sir George Warrender’s real estates  
 “ in Scotland, he hereby, in complete fulfilment of  
 “ his engagement to settle and secure to her the  
 “ said jointure of 1000*l.* binds and obliges himself,  
 “ and his heirs, executors, successors, and repre-  
 “ sentatives whatsoever, to pay to the said Anne  
 “ Boscawen, during all the days of her lifetime  
 “ after his decease, in case she shall survive him  
 “ only, an annuity of 420*l.* sterling, free of all  
 “ burdens and deductions whatever, at two terms

“ in the year, Whitsunday and Martinmas, by  
 “ equal portions, with 42*l.* sterling of penalty for  
 “ each term’s failure in payment of the said annuity,  
 “ and the legal interest of the said annuity from  
 “ the respective terms of payment thereof during the  
 “ non-payment of the same ; and beginning the first  
 “ term’s payment of the said annuity at the first  
 “ term of Whitsunday or Martinmas next after the  
 “ death of the said Sir George Warrender, for the  
 “ half year preceding, and so forth half yearly and  
 “ termly thereafter during her life. And for fur-  
 “ ther security and more sure payment to the said  
 “ Anne Boscawen of the said annuity, the said Sir  
 “ George Warrender binds and obliges himself and  
 “ his foresaids, upon his own charges, legally and  
 “ sufficiently to infeft and seise the said Anne  
 “ Boscawen in the said annuity of 420*l.* sterling,  
 “ free of all burdens and deductions whatever, to  
 “ be uplifted at the said two terms in the year,  
 “ Whitsunday and Martinmas, by equal portions,  
 “ and beginning the first term’s payment thereof at  
 “ the first of these terms next after the decease of  
 “ the said Sir George Warrender, with 42*l.* sterling  
 “ of penalty for each term’s failure, and the legal  
 “ interest of the said annuity from the respective  
 “ terms of payment thereof, during the not pay-  
 “ ment of the same, furth of all and whole, the  
 “ lands and farm of Goodspeed, presently occupied  
 “ by John Tait, as tenant thereof, and the lands  
 “ and farm of Myreside, presently occupied by  
 “ Alexander Sawers, as tenant thereof, with the  
 “ teinds of the said lands, and whole parts, pendi-  
 “ cles, privileges, and pertinents of the same, lying  
 “ within the parish of Dunbar, and constabulary of  
 “ Haddington, within the sheriffdom of Edinburgh,

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“ as more particularly described in the rights and  
“ investitures thereof.”

This deed was executed according to the forms of the law of Scotland. It contained all the clauses customary in such instruments. There was a clause empowering the defender to enter into possession of the lands in the event of the jointure not being regularly paid ; an assignation to the mails and duties, precept of sasine, &c.

In virtue of the precept of sasine contained in this antenuptial contract, the defender was infeft in the lands of Lochend, and in the lands of Goodspeed and others, conform to instrument of sasine in her favour, dated the 17th, and registered in the particular of sasines for the shire of Edinburgh, the 18th day of December, 1810 ; and at the date of the suit she stood infeft in those lands.

The other provisions contained in the marriage contract, amounting in certain events to 30,000*l.*, were in like manner secured over the pursuer's heritable property in Scotland.

The marriage took place in October, 1810, and immediately afterwards the pursuer, accompanied by the defender, returned to Scotland, where they remained till the month of May following. In the following spring the pursuer's duties as member of parliament requiring his attendance in London, they passed a few months at a hotel there, and immediately afterwards returned to his paternal residence at Lochend, where they remained for a considerable time. Afterwards the pursuer was prevented from continuing to pass as much of his time as formerly in Scotland, by accepting a seat, first at the Board of Admiralty, and subsequently at the Board of Control.

In consequence of differences which took place between the pursuer and defender, it was proposed on the part of the defender and her relatives, that there should be a separation between them.

In 1819, articles of agreement were executed, by which it was recited that they had agreed to live separate, and an annuity was secured to the wife so long as she should continue to live separate from the pursuer. They also contained a condition, "that if the said Sir George Warrender shall in any "one year, be obliged to pay, and shall pay any "debt or debts of the said Dame Anne Warrender, "hereafter contracted, to the amount, in the whole, "of upwards of 1010*l*., then and thenceforth the "covenants of the said Sir George Warrender, "hereinbefore contained, shall cease and be void."

It was further provided "that, if the said Sir "George Warrender, and Dame Anne his wife, "shall jointly be desirous of annulling these presents, and the agreements and provisions therein "contained, and shall signify such desire by writing "indorsed on these presents, or on a duplicate "thereof of such writing, to be under their joint "hands, and attested by two credible witnesses, "then and from thenceforth these presents, and "every article, matter, and thing herein contained, "shall cease, determine, and be null and void, any "thing herein contained to the contrary notwithstanding."

The deed of separation did not contain clauses empowering the wife to reside wherever she pleased, nor debarring the husband from suing for restitution of conjugal rights. But the pursuer gave to the defender's brothers, Lord Falmouth and the

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Honourable Mr. Boscawen, the following letter:  
 “ *My Lord and Sir,*—Although I have objected  
 “ to have any clauses inserted in the articles of  
 “ separation between Lady Warrender and myself,  
 “ which should contain a permission from me to  
 “ her, to go and reside where she pleases, or which  
 “ should preclude me from suing her in the Eccle-  
 “ siastical Court for restitution of conjugal rights,  
 “ I hereby pledge myself that Lady Warrender  
 “ shall be at liberty during our separation, to go  
 “ and reside where she pleases, and that I will not  
 “ institute any suit against her for the purpose  
 “ above mentioned. I am,” &c.

After the separation had been arranged on this footing, the Defender went to the Continent; and with the exception of a few months when she made a visit to London, she resided sometimes in France, and at other times in Switzerland and Italy, changing her place of abode from time to time, without having any fixed or permanent residence.

Circumstances having come to the knowledge of the Pursuer which led him to distrust the conjugal fidelity of the Defender, and having evidence that, during her residence in France, she had been guilty of an adulterous intercourse with Luigi Rabbitti, a music master in Paris, he instituted an action of divorce in the Scotch Courts.

The summons was served against the Defender edictally, in common form, and a full copy of it was served upon her personally at Versailles, where she happened at the time to be resident.

On the summons being called, appearance was entered for the Defender, who lodged defences

objecting to the jurisdiction of the Court, and denying the charge of adultery. These defences not being deemed satisfactory, were appointed to be amended.

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In the amended pleading, three preliminary defences were urged: 1st, that the Defender is not subject to the jurisdiction of this Court, in respect that she is not domiciled in this country; 2d, that the citation is erroneous, inasmuch as the Defender ought to have been cited at the Pursuer's residence; and, 3d, that the marriage having been contracted in England, can only be dissolved by the authority of parliament.

On the 28th of June 1834 the Judges of the Court of Session pronounced an interlocutor, by which they repelled the preliminary defences.\*

The Appeal was against this Judgment.

For the Appellant; the *Attorney-General* and Dr. *Addams*.

For the Respondent; Sir *W. W. Follett* and Dr. *Lushington*.

As to the 1st objection, the Appellant relied on *Brunsdon v. Wallace* †, *Grant v. Pedie* ‡, *Pirie v. Lunan* §, *Sharpe v. Orde*, and the maxim *Actor sequitur forum rei*; and contended that the deed of separation not being revocable as in other cases, repelled the fiction, that the domicile of the wife followed that of the husband: that *Tovey v. Lindsey* || was a decisive authority against the Respondents upon the first objection.

Upon the 2d objection, the Appellants relied on *French v. Pilcher* ¶.

\* 12 Shaw & D. 847.

† 1 Wils. & Shaw, 716.

‡ 1 Dow. 117. & MSS.

† Fac. Coll. Feb. 1789.

§ Fac. Coll. March, 1796.

¶ Fac. Coll. June, 1800.

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Upon the 3d objection, the Appellants relied on *Edmonston v. Edmonston*\*, *Forbes v. Forbes*†, *Levett v. Levett*‡, *Lolley's case*§, *Bruce v. Bruce*, *Beazley v. Beazley*||, *M'Carthy v. De Cair*¶. In Chancery 1813, *Moscombe v. M'Lelland*\*\*.

On the part of the Respondent it was answered, as to the 1st objection, the domicile of the husband, is the domicile of the wife, *Cod. l. 10. t. 39. s. 9. Voet. de Confl. leg. t. 2. s. 40. and l. 5. T. 1. s. 101.*; *Stair B. 1. t. 4. s. 9.*, *French v. Pilcher*, ante, *Gosson v. Blake* Fac. Coll. 6th July 1826, *Lauder v. Vanghent*, 27th February 1692, *Gordon v. Eaglesgraaf*, 9th June 1699, *Chichester v. Donegal*, 1 Add. Eccl. Rep. p. 19., *Huber de conflictu legum* s. 10., *Robinson v. Bland*, 1 W. Blac. 234. Burr. 1077.

Upon the effect of the deed of separation, the Respondent cited 2 Roper's H. & W. 285. : that a voluntary separation may be annulled by cohabitation or suit — *Fletcher v. Fletcher*, 2 Cox 99., *Bateman v. Ross*, 1 Dow. 235. and MSS. *penes Aut* : that the relation can only be dissolved by decree or Act of Parliament, *Mortimer v. Mortimer*, 2 Hagg. 318., *King v. Sansom*, 3 Add. 277., *Beeby v. Beeby*, 1 Hagg. 142., *Sullivan v. Sullivan*, 2 Add. 299. : that Courts of Equity are scrupulous in the execution of deeds of separation, *Wilkes v. Wilkes*, 2 Dick. 791., *Legard v. Johnson*, Ves. 352., *St. John v. St. John*, 11 Ves. 526., *Worrall v. Jacob*, 3 Meriv. 256. : so Courts of Law, *Marshall v. Rutton*, 8 T. R. 546., *Beard v. Webb*, 2 Bos. & P. 93. : that *Tovey v. Lindsay* turned upon a doubt, whether the domicile of the husband was not in

\* Ferg. Cons. Rep. 68.

† Id. 168.

‡ Id. 209.

§ Fac. Coll. March, 1812. and Russ. &amp; Ry. C. C. 237.

|| 2 Bos. &amp; P. 229. ¶ 3 Hagg. 639. \*\* Ferg. Cons. Rep.

England, and that *Pirie v. Lunan* and *Beazley v. Beazley* were cases of domicile foreign to Scotland.

As to the 2d objection, they argued that it turned upon the law of citation, which was regulated by 6 Geo. 4. c. 120. s. 53., and the act of *sederunt*, 14th Dec. 1805, s. 1.

As to the 3d objection, the Respondent's Counsel cited the cases of *Edmonstone v. Edmonstone*, *Butler v. Forbes*, *Duntse v. Levit*, and *Kibblewhite v. Rowland*, in 1816. Ferguson on Consistorial Law p. 84., who states the result of these cases as follows:—"According to these precedents, the  
 "municipal law of Scotland is also now applied by  
 "the Consistorial Judicature in all cases of divorce,  
 "without distinction, whether the parties are  
 "foreign or domiciled subjects and citizens of this  
 "kingdom; whether, when foreign, the law of  
 "their own country affords the same remedy or  
 "not, and whether they have contracted their  
 "marriage within this realm or in any other; pro-  
 "vided only, that they have become properly  
 "amenable to the jurisdiction in this *forum*, &c.  
 "The rule has, for a period of more than ten  
 "years, stood as fixed by them, and the subsequent  
 "practice has furnished additional instances of  
 "its application."

That contracts are to be construed by the law of the place where the parties intended they should be carried into execution.\* *Ilderton v. Ilderton* †, a case of dower: *Anstruther v. Chalmers* ‡, a will: *Brown v. Crawford* §, *Stevenson v. Stewart* ||, *Watson v. Renton* ¶, *Armour v. Campbell* \*\*.

\* Pandect, Lib. 21. tit. de obligationibus and actionibus Huber de Compl. leg. s. 10.

† 2 H. Blac. 145. ‡ 2 Sim. 1. § Morr. Dict. 1587.

|| Id. 1518. ¶ Id. 4476. \*\* Bell's Rep. 103.

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They also cited *Blount v. Blount*, in 1801, and pointed out that the cases \* referred to were all decided subsequently to the decision in *Lolley v. Sugden*, and that the soundness of the decision in *Lolley's* case, though pronounced by the Twelve Judges in England, was doubted by *Lord Eldon*, who then held the Seals, and that those doubts had been repeatedly expressed by his Lordship in subsequent cases: That in the case of *Ross v. Rose*, decided in the House of Lords, 16th July 1830, *Lord Eldon*, in allusion to that decision, is reported to have said, "The Twelve Judges found, that the marriage having occurred in England, the divorce, *a vinculo matrimonii* could not take place, but by an English Act of Parliament; whether that is right or wrong I shall not stop to discuss:" That in the case of *M'Arthy v. De Cair* in Chancery 1831, the Lord Chancellor, in adverting to *Lord Eldon's* views on the subject, says, "he took a note of the very words in which *Lolley's* case was decided. *Lord Eldon* had that before him, and he followed it in deciding those two cases. He might have expressed some doubt; I don't say that he did not. He said, I think we shall most likely hear more of it afterwards; but he considered that he was bound by it to the extent of following it in those cases."

Sept. 1835. *Lord Brougham*. — Sir George Warrender, a Scotch baronet, possessed of large hereditary estates in Scotland, — born and educated in that country, and having there his capital mansion where he resided the greater part of the year, except when he

\* The cases are collected in Ferg. Consist. Law *quod supra*, and partly stated and commented on by Lord Lyndhurst, *post*, 147. *et seq.*

held office, or was attending his parliamentary duties in England — intermarried in London, in 1810, with the daughter of the Viscount Falmouth, Anne Boscawen, who was born and educated in England, and never had been in Scotland previous to the marriage. After that event, she was twice there with her husband, but subsequently he resided for the most part in London, to discharge the duties of Lord of the Admiralty and Commissioner of East India Affairs, — offices which he held from 1812 to 1819, inclusive. In the latter year, at the end of much domestic dissension, a separation was determined upon, and an agreement executed by the parties, in which, after setting forth by way of recital only, their having agreed to live separate, Sir George binds himself to allow Dame Anne Warrender a certain annuity; and it is further agreed that the agreement shall only be rescinded by common consent and in a certain specified manner. A letter was written by Sir George, bearing equal date with the agreement, and addressed to the trustees under the marriage-settlement. In this he states that he had refused to insert any provision for her being allowed to live apart, in order that he might not be precluded from suing, if he chose, for restitution of conjugal rights, but also stating that it was not his intention ever to do so, or to interfere with or molest her in the choice of a residence. The marriage-settlement had secured her a jointure upon the Scotch real estates, upon which fact it is now admitted that nothing can turn, except that it may serve the better to show the connection of the parties and the contract with Scotland.

These are the facts, and the undisputed facts of

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this case. I say undisputed ; for the attempt occasionally made in the course of the Appellant's argument to create some doubt as to Sir George Warrender's Scotch residence and domicile cannot be considered as persisted in with such a degree of firmness or uniformity as to require a discussion and a decision of the point in order to clear the way for the very important legal question which arises upon these plain and undeniable statements.

In 1834, after the parties had lived separate for fifteen years, Sir George's residence being, during the latter part of the time, almost constantly on his Scotch estates, and Lady Warrender's varying from one country to another — a few months in England, generally in France, and occasionally in Italy — Sir George brought his suit in the Court of Session (exercising, under the recent statute, the consistorial jurisdiction formerly vested in the Commissaries), for divorce by reason of adultery alleged to have been committed by his wife. Lady Warrender took preliminary objections to the competency of the suit under three heads: First, that the summons of divorce was not served on her at her husband's residence so as to give her a regular citation. Secondly, that the Court had no jurisdiction, inasmuch as the wife's domicile was no longer her husband's after the separation. Thirdly, that even if the service had been regular, and the two domiciles one and the same, and that domicile Scotland, the marriage having been contracted in England, and one of the parties being English, no sentence of a Scotch Court could dissolve the contract. To these several points I propose to address myself in their order, and the *first* needs not detain us long.

1st. For it is clear that if the wife's domicile is not in Scotland, her being cited or not cited at the mansion is wholly immaterial, and the minor objection of irregularity merges in the exception to the jurisdiction ; and if the wife's domicile was in Scotland, it must be her husband's, which, indeed, the objection supposes, that then the argument amounts to this, that Sir George should have served himself with a notice by way of regularly serving his wife. Surely it is unnecessary to show that such a proceeding would have been nugatory, not to say ridiculous, and that the omission if it can work nothing against the validity of the notice. Lady W. had, it is admitted on all hands, personal service and full notice of the proceeding against her, nor was any reliance placed upon her domicile in contemplation of law — that is her husband's domicile — being sufficient to exclude the necessity of bringing notice in point of fact home to her. If the preliminary objection to the service is good for any thing, it is good to show that the Pursuer might have served a notice on her whom he knew to be some hundreds of miles distant, by leaving it for her in his own house, and then have considered this as good and sufficient service without personally notifying his intended suit to her, or serving her with the summons which he had filed. We may therefore come at once to the serious and more substantial exceptions taken against the jurisdiction ; the first of which arises upon the domicile as affected by the articles of separation.

2d. It is admitted on all hands that, in the ordinary case, the husband's domicile is the wife's also ; that, consequently, had Lady Warrender been ei-

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ther residing really and in fact with her husband, or been accidentally absent for any length of time, or even been by some family arrangement, without more, in the habit of never going to Scotland, which was not her native country, while he lived generally there, no question could have been raised upon the competency of the action as excluded by her non-residence. For actual residence — residence in point of fact — signifies nothing in the case of a married woman, and shall not, in ordinary circumstances, be set up against the presumption of law, that she resides with her husband. Had she been absent for her health, or in attendance upon a sick relation, or for economical reasons, how long soever this separation *de facto* might have lasted, her domicile could never have been changed. Nay, had the parties lived in different places from a mutual understanding which prevailed between them, the case would still be the same. The law could take no notice of the fact, but must proceed upon its own conclusive presumption, and hold her domiciled where she ought to be, and where, in all ordinary circumstances, she would be — with her husband. Does the execution of a formal instrument recognising such an understanding make any difference in the case? This is all we have here; for there is no agreement to live separate. The “letter” has indeed been imported into the agreement, and argued upon as a part of it. Now, not to mention that the instrument in which parties finally state their intentions and mutually stipulate and bind themselves, is always to be regarded as their only contract; and that no separate or subsequent agreement is to be taken into the account, unless it contains some

collateral agreement — admitting that we have a right to look at the letter at all, either as part of one transaction with the agreement, or as providing for something left unsettled in the principal instrument, and so collateral in some sort to the contract itself, it does not appear that the tenor of the letter aids the appellant's contention. For the letter sets out with expressly saying that Sir George has refused to insert in the agreement a leave to live apart, in order to preclude all objection against his suing for restitution of conjugal rights. Is not this sufficient to deprive the letter of all binding force in law, whatever else it may contain? In truth, the words which follow this preliminary statement amount only to an honorary pledge in no legal view obligatory, even had they stood alone; but, taken in connection with the preceding statement, they plainly exclude all possibility of construing the letter as a legal obligation. It therefore appears impossible to consider the parties in this case as living apart under a contract of separation. The agreement, by its obvious construction, only imports an obligation upon Sir G. W. to pay so much a year to Lady W. as long as she should live apart from him. But let us suppose it to be an ordinary deed of separation; that it contained a covenant on the husband's part to permit the wife to live apart from him, and to choose her own residence; and let us consider what difference this would make, and whether or not this would be sufficient to determine the legal presumption of domicile.

First of all, it must be admitted that, even if the execution of such a deed gave the wife a power of choosing a residence, and if that resi-

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dence once chosen were to be deemed her separate domicile, still this would only give her a power; and unless she had executed the power by choosing a residence, no new domicile could be acquired by her. The domicile which she had before marriage was for ever destroyed by that change in her condition. The dissolution of the marriage by divorce, or by the husband's decease, never could remit her to her original or maiden domicile: much less could this be affected by any such deed as we are supposing — for that, by the utmost possible stretch of the supposition, could only give her the option of taking a new domicile, other than her husband's; and until she did exercise this option, her married or marital domicile would not be changed. Now there is no evidence here of Lady W. having ever acquired any domicile after 1819, other than the one she had before the separation, that is to say, her husband's; and this proof clearly lay upon her, for she sets up the separation to exclude the legal presumption that she is domiciled with her husband; and the separation only conveying to her a power of choosing a domicile, and the production of the articles only proving that power to have been conferred upon her, unless she goes further, and also proves the exercise of the power by acquiring a new domicile, she proves nothing. She only shows, and all the ample admissions we are, for the sake of argument, making, confess that she had obtained the power or possibility of gaining a domicile either than her husband's, but not at all that she had actually gained such separate domicile. The evidence in the cause is nothing to this purpose. It is, indeed, rather against than for the Appellant's argument; it

rather shows that she had done nothing like gaining a new domicile, for she was living chiefly abroad, and in different places. But there is at any rate no evidence in the cause of her acquiring a separate domicile, and the proof lying upon her, it follows that, for all the purposes of the present question, her husband's Scotch domicile is her own. But suppose we pass over this fundamental difficulty in her case, and which appears to me decisive of the exception with which I am now dealing, I am of opinion that there is nothing in the separation, supposing it had been ever so formal, and ever so full in its provisions, which can by law displace the presumption of domicile raised by the marriage, and subsisting in full force as long as the marriage endures.

A party relying on the *lex loci contractus*, in construing the import and tracing the consequences of the marriage-contract, cannot well be heard to deny that the same *lex loci* must regulate the construction and the consequences of any deed of separation between the married pair. Nor do I understand the Appellant as repudiating the English law as to the import of the separation in this case. Then what is the legal value or force of this kind of agreement in our law? Absolutely none whatever — in any Court whatever — for any purpose whatever, save and except one only — the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach — no specific performance of its articles can be decreed. No Court, civil or con-

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sistorial, can take notice of its existence. So far has the legal presumption of cohabitation been carried by the common law courts, that the most formal separation can only be given in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society; and all the evidence that can be adduced of the fact of living apart, and all the instruments that can be produced binding the husband to suffer the separate residence of his wife—nay, even where he has for himself stipulated for her living apart, and laid her under conditions that she should never come near him—all is utterly insufficient to repel the claim which he makes for the loss of her society without doing any act either in court or in *pais*, to determine the separation or annul the agreement. In other words, no fact and no contract, no matter in *pais* and no deed executed, can rebut the overruling presumption of the law that the married persons live together, or, which is the same thing, that they have one residence—one domicile. In the contemplation of the common law, then, they live together and have the same domicile. That the Consistorial Courts regard the matter in the same light is manifest from the strong decision given upon the 3 and 4 Geo. 4., as applicable to a case where the parties had never been near one another for ten years before it passed; yet this case was held within the provision of the statute which gives the benefit of confirmation of the marriage to all parties who have been living together at and before the passing of the act. But we need not resort to such extreme cases, or seek support from such strong decisions. It is admitted

on all hands, that the Consistorial Courts never regard a separation, how formal soever, as of any avail at all against either party, nor require any person suing for his rights under the marriage, and standing on the marriage, to do any act for annulling the separation. Either party has a clear and undenied right to pass it by entirely, and proceed, whether in bringing or in defending a suit, exactly as if the separation articles had no existence.

Third. We are therefore, in every view that can be taken of the question, bound to regard Lady Warrender's domicile as identical with her husband's, and thus the case becomes divested of all special circumstances, and is that of a marriage had in England between a domiciled Scotchman and an English woman, sought to be dissolved by reason of the wife's adultery, through a suit in the Courts in Scotland, the residence or domicile of the husband being *bonâ fide* Scotch; and as the determination at which we have arrived upon the question of domicile makes the *forum originis* of the wife quite immaterial, the question is in truth the general one, whether or not a Scotch divorce can dissolve a marriage contracted by a domiciled Scotchman in England, the parties to that marriage being *bonâ fide* and not collusively for the purposes of the suit, domiciled in Scotland. The importance of this question to the parties, and, considering the constant and fortunate intercourse between the two countries, to the law which governs each, cannot be denied; at the same time it is of considerably less interest than it would have been had the domicile not been *bonâ fide* Scotch, because then the more absolute question would have been raised as to the validity of a Scotch divorce gene-

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rally, to dissolve an English marriage. Possibly the decisions upon the validity of Scotch marriages generally and without regard to the fraud upon the English law, practised by the parties to them, may seem to make the distinction to which I have just adverted less material and substantial; nevertheless I think it right and convenient to make it, and to keep it in view.

The general principle is denied by no one that the *lex loci* is to be the governing rule in deciding upon the validity or invalidity of all personal contracts. This is sometimes expressed, and I take leave to say inaccurately expressed, by saying that there is a *comitas* shown by the tribunals of one country towards the laws of the other country. Such a thing as *comitas* or courtesy may be said to exist in certain cases, as where the French Courts inquire how our law would deal with a Frenchman in similar or parallel circumstances, and upon proof of it, so deal with an Englishman in those circumstances. This is truly a *comitas*, and can be explained upon no other ground; and I must be permitted to say, with all respect for the usage, it is not easily reconcilable to any sound reason. But when the Courts of one country consider the laws of another in which any contract has been made, or is alleged to have been made, in construing its meaning, or ascertaining its existence, they can hardly be said to act from courtesy, *ex comitate*, for it is of the essence of the subject matter to ascertain the meaning of the parties, and that they did solemnly bind themselves; and it is clear that you must presume them to have intended what the law of the country sanctions or supposes; and equally clear that their adopting the forms and

solemnities which that law prescribes, shows their intention to bind themselves, nay more, is the only safe criterion of their having entertained such an intention. Therefore the Courts of the country where the question arises, resort to the law of the country where the contract was made, not *ex comitate*, but *ex debito justitiæ*; and in order to explicate their own jurisdiction by discovering that which they are in quest of, and which alone they are in quest of, the meaning and intent of the parties.

But whatever may be the foundation of the principle, its acceptance in all systems of jurisprudence is unquestionable. Thus, a marriage good by the laws of one country, is held good in all others where the question of its validity may arise. For why? The question always must be, Did the parties intend to contract marriage? And if they did: what in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract. If those laws annex certain qualifications to parties circumstanced in a particular way, or if they impose certain conditions precedent on certain parties, this falls exactly within the same rule; for the presumption of law is in the one case, that the parties are absolutely incapable of the consent required to make the contract, and in the other case, that they are incapable until they have complied with the conditions imposed. I shall only stop here to remark, that the English jurisprudence, while it

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adopts this principle in words, would not perhaps, in certain cases which may be put, be found very willing to act upon it throughout. Thus, we should expect that the Spanish and Portuguese Courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, though solemnized under papal dispensation, because it would clearly be avoidable in this country. But I strongly incline to think that our Courts would refuse to sanction, and would avoid by sentence, a marriage between those relatives contracted in the Peninsula, under dispensation, although beyond all doubt such a marriage would there be valid by the *lex loci contractus*, and incapable of being set aside by any proceedings in that country.

But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. If indeed there go two things under one and the same name in different countries — if that which is called marriage is of a different nature in each — there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different *status*, from Turkish or other marriages among infidel nations, because we clearly never should recognise the plurality of wives, and consequent validity of second marriages standing.

the first, which second marriages the laws of those countries authorise and validate. This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same every where. Therefore all that the Courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation which those Courts are acquainted with, and know how to deal with, has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had ; the relation has been constituted ; and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer.

But it is said that what is called the *essence* of the contract must also be judged of according to the *lex loci* ; and as this is a somewhat vague, and for its vagueness, a somewhat suspicious proposition, it is rendered more certain by adding, that dissolubility or indissolubility is of the essence of the contract. Now I take this to be really *petitio principii*. It is putting the very question under discussion into another form of words, and giving the answer in one way. There are many other things which may just as well be reckoned of the essence as this. If it is said that the parties marrying in England must be taken all the world over to have bound themselves to live until death, or an Act of Parliament them "do part ;" why shall it not also be said that they have bound themselves to live together on such terms, and with such mutual personal rights and duties as the English law

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recognises and enforces? Those rights and duties are just as much of the essence as dissolubility or indissolubility; and yet all admit, all must admit, that persons married in England and settled in Scotland will be entitled only to the personal rights which the Scotch law sanctions, and will only be liable to perform the duties which the Scotch law imposes. Indeed if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by and subsisting with another, polygamy being there of the essence of the contract.

The fallacy of the argument, "that indissolubility is of the essence," appears plainly to be this; it confounds incidents with essence; it makes the rights under a contract or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the Courts of the country where the parties reside, and where the contract is to be carried into execution.

But at all events this is clear, and it seems decisive of the point, that if on some such ground as this a marriage indissoluble by the *lex loci* is to be held indissoluble everywhere, so conversely, a marriage dissoluble, by the *lex loci* must be held everywhere dissoluble. The one proposition is in truth identical with the other. Now it would

follow from hence, or rather it is the same proposition, that a marriage contracted in Scotland where it is dissoluble by reason of adultery, or of non-adherence, is dissoluble in England, and that at the suit of either party. Therefore a wife married in Scotland might sue her husband in our courts for adultery, or for absenting himself four years, and ought to obtain a divorce *a vinculo matrimonii*. Nay, if the marriage had been solemnized in Prussia, either party might obtain a divorce on the ground of incompatibility of temper; and if it had been solemnized in France during the earlier period of the revolution, the mere consent of the parties ought to suffice for dissolving it here. Indeed another consequence would follow from this doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the courts, and their power of dealing with the rights and duties of the parties to it. If there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in *pais* to separate, every other country ought to sanction a separation had in *pais* there, and uphold a second marriage contracted after such a separation. It may safely be asserted that so absurd a proposition never could for a moment be entertained; and yet it is not like, but identical with the proposition upon which the main body of the Appellant's argument rests, that the question of indissoluble or dissoluble must be decided in all cases by the *lex loci*.

Hitherto we have been considering the contract as to its nature and solemnities, and examining how far, being English, and entered into with reference

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only to England, it could be dissolved by a Scotch sentence of divorce. But the circumstance of parties belonging to one country marrying in another (which is the case at bar), presents the question in another light. In personal contracts much depends upon the parties having regard to the country where it is to be acted under, and to receive its execution—upon their making the contract, with a view to its execution in that country. The marriage-contract is emphatically one which parties make with an immediate view to the usual place of their residence. An Englishman marrying in Turkey contracts a marriage of an English kind, that is, excluding plurality of wives, because he is an Englishman and only residing in Turkey and under the Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England, and for English purposes; consequently the incidents and effects, nay the very nature and essence (to use the language of the Appellant's argument) must be ascertained by the English, and not by the Turkish law. So of an Englishman marrying in Prussia, where incompatible temper, that is disagreement, may dissolve the contract. As he marries with a view to English domicile, his contract will be judged by English law, and he cannot apply for a divorce here, upon the ground of incompatible tempers. In like manner a domiciled Scotchman may be said to contract not an English but a Scotch marriage, though the consent wherein it consists may be testified by English solemnities. The Scotch parties looking to residence and rights in Scotland, may be held to regard the nature and

incidents and consequences of the contract according to the law of that country, their home; a connection formed for cohabitation for mutual comfort, protection, and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises and perform those duties which were the objects of the union; in a word their domicile; the place so beautifully described by the civilian — “*locus ubi quisque larem suum posuit sedemque futurarum suarum, unde cum proficiscitur peregrinare videtur, quo cum revertitur redire domum.*” It certainly may well be urged, both with a view to the general question of *lex loci*, and especially in answering the argument of the alleged essential quality of indissolubility, that the parties to a contract like this must be held emphatically to enter into it with a reference to their own domicile and its laws; that the contract assumes, as it were, a local aspect, but that at any rate, if we infer the nature of any mutual obligation from the presumed intentions of the parties, and if we presume those intentions from supposing that the parties had a particular system of laws in their eye (the only foundation of the argument for the Appellant), there is fully more reason to suppose they had the law of their own home in their view, where they purposed to live, than the law of the stranger, under which they happened for the moment to be.

Suppose we take now another but a very obvious and intelligible view of the subject, and regard the divorce not as a remedy given to the injured party by freeing him from the chain that binds him to a guilty partner, but as a punishment in-

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fllicted upon crime, for the purpose of preventing its repetition, and thus keeping public morals pure. The language of the Scotch acts plainly countenances this view of the matter, and we may observe how strongly it bears upon the present question. No one can doubt that every state has the right to visit offences with such penalties as to its legislative wisdom shall seem meet. At one time adultery was punishable capitally in England; it is so in certain cases still by the letter of the Scotch law. Whoever committed it must have suffered that punishment had the law been enforced, and without regard to the marriage of which he had violated the duties having been contracted abroad. Indeed in executing such statutes, no one ever heard of a question being raised as to where the contract had been made. Suppose again that the proposition frequently made in modern times were adopted, and adultery were declared to be a misdemeanour, could any one tried for it either here or in Scotland set up in his defence, that to the law of the country where he was married there was no such offence known? In like manner if a disruption of the marriage tie is the punishment denounced against the adulterer for disregarding its duties, no one can pretend that the tie being declared indissoluble by the laws of the country where it was knit, could afford the least defence against the execution of the law declaring its dissolution to be the penalty of the crime. Whoever maintains that the Scotch Courts are to take cognizance of the English law of indissolubility when called upon to inflict the penalty of divorce, must likewise be prepared to hold that, in punishing any other offence, the same Courts are to regard the

laws of the state where the culprit was born, or where part of the transaction passed; that, for example, a forgery being committed on a foreign bill of exchange, the punishment awarded by the foreign law is to regulate the visitation of the offence under the law of Scotland. It may safely be asserted, that no instance whatever can be given of the criminal law of any country being made to bend to that of any other in any part of its administration. When the Roman citizen carried abroad with him his rights of citizenship, and boasted that he could plead in all the Courts of the world "*civis Romanus sum*," his boast was founded not on any legal principle, but upon the fact that his barbarian countrymen had overrun the world with their arms, reduced all laws to silence, and annihilated the independence of foreign legislatures. Their orators regarded this very plea as the badge of universal slavery which their warriors had fixed upon mankind. But if any foreigner had come to Rome, and committed a crime punishable with loss of civil rights, he would in vain have pleaded in bar of the *capitis diminutio*, that citizenship was indelible and indestructible in the country of his birth. The *lex loci* must needs govern all criminal jurisdiction, from the nature of the thing and the purpose of that jurisdiction. How then can we say that when the Scotch law pronounces the dissolution of a marriage to be the punishment of adultery, the Scotch Courts can be justified in importing an exception in favour of those who had contracted an English marriage; an exception created by the English law and to the Scotch law unknown?

But it may be said that the offence being com-

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mitted abroad, and not within the Scotch territory, prevents the application to it of the Scotch criminal law. To this it may however be answered, that where a person has his domicile in a given country, the laws of that country to which he owes allegiance may visit even criminally offences committed by him out of its territory. Of this we have many instances in our own jurisprudence. Murder and treason committed by Englishmen abroad are triable in England and punishable here. Nay, by the bill which I introduced in 1811, and which is constantly acted upon, British subjects are liable to be convicted of felony for slave-trading in whatever part of the world committed by them. It would no doubt be going far to hold the wife criminally answerable to the law of Scotland in respect of her legal domicile being Scotch. But we are here not so much arguing to the merits of this case, which has abundant other ground to rest upon, as to the general principle ; and at any rate the argument would apply to the case most frequently mooted, of English married parties living temporarily in Scotland, and adultery being there committed by one of them. To such a state of facts the whole argument now adduced is applicable in its full force ; and without admitting that application, I do not well see how we can hold that the Scotch legislature ever possessed that supreme power which is absolutely essential to the very nature and existence of a legislature. If we deny this application, we truly admit that the Scottish Parliament had no right to punish the offence of adultery by the penalty of divorce. Nay, we hold that English parties had a right to violate the Scotch criminal law with perfect im-

punity in one essential particular ; for suppose no other penalty had been provided by the Scotch law except divorce, all English offenders against that law must go unpunished. Nay, worse still, all Scotch parties who chose to avoid the punishment had only to marry in England, and then the law, the criminal law, of their own country became inoperative. The gross absurdity of this strikes me as bearing directly upon the argument, and as greater than that of any consequences which I remember to have seen deduced from almost any disputed position. It may further be remarked, that this argument applies equally to the case, if we admit that the Scotch divorce is invalid out of Scotland, and consequently that it stands well with even the principles of Lolley's case.

In order to dispose of the present question, it is not at all necessary on the one side, to support, or on the other to impeach, the authority of Lolley's case, or of any other which may have been determined in England upon that authority. This ought to be steadily borne in mind. The resolution in Lolley's case was that an English marriage could not be dissolved by any proceeding in the Courts of any other country, for English purposes ; in other words, that the Courts of this country will not recognise the validity of Scotch divorce, but will hold the divorced wife dowable of an English estate, the divorced husband tenant thereof by the courtesy, and either party guilty of felony by contracting a second marriage in England. Upon the force and effect of such divorce in Scotland, and for Scotch purposes, the Judges gave, and indeed could give, no opinion ; and as there would be nothing legally impossible in a marriage being

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good in one country which was prohibited by the law of another ; so if the conflict of the Scotch and English law be complete and irreconcilable, there is nothing legally impossible in a divorce being valid in the one country which the Courts of the other may hold to be a nullity. Lolley's case therefore cannot be held to decide the present, perhaps not even to affect it in principle. In another point of view it is inapplicable; for, though the decision was not put upon any special circumstance, yet in fairly considering its application, we cannot lay out of view that the parties were not only married, but really domiciled, in England, and had resorted to Scotland for the manifest purpose of obtaining a temporary and fictitious domicile there, in order to give the Scotch Courts jurisdiction over them, and enable them to dissolve their marriage ; whereas here the domicile of the parties is Scotch, and the proceeding is *bonâ fide* taken by the husband in the Courts of his own country, to which he is amenable, and ought to have free access, and no fraud upon the law of any other country is practised by the suit. It must be added that, in Lolley's case, the English marriage had been contracted by English parties, without any view to the execution of the contract at any time in Scotland ; whereas the marriage now in question was had by a Scotchman and a woman whom the contract made Scotch, and therefore may be held to have contemplated an execution and effects in Scotland.

But although for these reasons, the support of my opinion does not require that I should dispute the law in Lolley's case, I should not be dealing fairly with this important question, if I were to

avoid touching upon that subject : and as no decision of this House has ever adopted that rule, or assumed its principle for sound, and acted upon it, I am entitled here to express the difficulty which I feel in acceding to that doctrine—a difficulty which much deliberation and frequent discussion with the greatest lawyers of the age — I might say both of this and of the last age — has not been able to remove from my mind.

If no decision had ever been pronounced in this country, recognising the validity of Scotch marriages between English parties going to Scotland with the purpose of escaping from the authority of the English law, I should have felt it much easier to acquiesce in the decision of which I am speaking. For then it might have been said consistently enough, that whatever may be the Scotch marriage law among its own subjects, and for the government of Scotch questions, ours is in irreconcilable conflict with it, and we cannot permit the positive enactments of our statute-book and the principles of our common law to be violated or eluded by merely crossing a river, or an ideal boundary line. Nor could any thing have been more obvious than the consistency of those who, holding that no unmarried parties incapable of marrying here, can, in fraud of our law, contract a valid marriage in Scotland, by going there for an hour, should also hold the cognate doctrine that no married parties can dissolve an English marriage, indissoluble here, by repairing thither for six weeks. But upon this firm ground, the decision of all the English Courts have long since prevented us from taking our stand. They have held, both the Consistorial Judges in *Compton v. Bearcroft*, and those of the common

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law in *Ilderton v. Ilderton*, the doctrine uniformly recognised in all subsequent cases, and acted upon daily by the English people, that a Scotch marriage contracted by English parties in the face and in fraud of the English law, is valid to all intents and purposes, and carries all the real and all the personal rights of an English marriage, affecting in its consequences, land, and honours, and duties, and privileges, precisely as does the most lawful and solemn matrimonial contract entered into among ourselves, in our own churches, according to our ritual, and under our own statutes.

It is quite impossible after this to say that we can draw the line, and hold a foreign law which we acknowledge all-powerful for making the binding contract to be utterly impotent to dissolve it. Were a sentence of the Scotch Court in a declarator of marriage to be given in evidence here, it would be conclusive that the parties were man and wife, and no exception could be taken to the admissibility or the effect of the foreign evidence upon the ground of the parties having been English, and repaired to Scotland for the purpose of escaping the provisions of the English law. A similar sentence of the same Court, declaring the marriage to be dissolved by the same law of Scotland, is now supposed to be given in evidence between parties who had married in England. Can it, in any consistency of reason, be objected to the reception or to the force of this sentence, that the contract had been made, and the parties had resided here? In what other contract of a nature merely personal—in what other transaction between men—is such a rule ever applied—such an arbitrary and gratuitous distinction made—such

an exception raised to the universal position, that things are to be dissolved by the same process whereby they are bound together; or rather, that the tie is to be loosened by reversing the operation which knit it, but reversing the operation according to the same rules? What gave force to the ligament? If a contract for sale of a chattel is made, or an obligation of debt is incurred, or a chattel is pledged in one country, the sale may be annulled, the debt released, and the pledge redeemed by the law and by the forms of another country in which the parties happen to reside, and in whose courts their rights and obligations come in question, unless there was an express stipulation in the contract itself against such avoidance, release, or redemption. But at any rate this is certain, that if the laws of one country and its courts recognise and give effect to those of another in respect of the constitution of any contract, they must give the like recognition and effect to those same foreign laws when they declare the same kind of contract dissolved. Suppose a party forbidden to purchase from another by our equity, as administered in the Courts of this country (and we have some restraints upon certain parties, which come very near prohibition); and suppose a sale of chattels by one to another party standing in this relation towards each other, should be effected in Scotland, and that our Courts here should (whether right or wrong) recognise such a rule, because the Scotch law would affirm it—surely it would follow that our Courts must equally recognise a rescission of the contract of sale in Scotland by any act which the Scotch law regards as valid to rescind it, although our own law may not regard it as sufficient.

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Suppose a question to arise in the Courts of England respecting the execution of a contract thus made in this country, and that the objection of its invalidity were waved for some reason ; if the party resisting its execution were to produce either a sentence of a Scotch Court declaring it rescinded by a Scotch matter done in *pais*, or were merely to produce evidence of the thing so done, and proof of its amounting by the Scotch law to a rescission of the contract—I apprehend that the party relying on the contract could never be heard to say, “The contract is English, and the Scotch proceeding is impotent to dissolve it.” The reply would be, “Our English Courts have (whether right or wrong) recognised the validity of a Scotch proceeding to complete the obligation, and can no longer deny the validity of a similar but reverse proceeding to dissolve it—*unumquodque dissolvitur eodem modo quo colligatur.*”

Suppose, for another example (which is the case), that the law of this country precluded an infant or a married woman from borrowing money in any way, or from binding themselves by deed ; and that in another country those obligations could be validly incurred ; it is probable that our law and our Courts would recognise the validity of such foreign obligations. But suppose a *feme covert* had executed a power, and conveyed an interest under it to another *feme covert* in England, could it be endured that where the donee of the power produced a release under seal from the *feme covert* in the same foreign country, a distinction should be taken, and the Court here should hold that party incapable of releasing the obligation ? Would it not be said that our Courts having decided the con-

tract of a *feme covert* to be binding, when executed abroad, must, by parity of reason, hold the discharge or release of the *feme covert* to be valid, if it be valid in the same foreign country?

Nor can any attempt succeed, in this argument, which rests upon distinctions taken between marriage and other contracts, on the ground that its effects govern the enjoyment of real rights in England, and that the English law alone can regulate the rights of landed property. For not to mention that a Scotch marriage between English parties gives English honours and estates to its issue, which would have been bastard had the parties married, or pretended to marry, in England; all personal obligations may in their consequences affect real rights in England. Nor does a Scotch divorce, by depriving a widow of dower or arrears of pin money charged on English property, more immediately affect real estate here, than a bond or a judgment released in Scotland according to Scotch forms, discharges real estate of a lien, or than a bond executed, or indeed a simple contract debt incurred in Scotland, eventually and consequentially charges English real estate.

It appears to me quite certain, that those who decided *Lolley's* case did not look sufficiently to the difficulty of following out the principle of the rule which they laid down. At first sight, on a cursory survey of the question, there seems no impediment in the way of a judge who would keep the English marriage contract indissoluble in Scotland, and yet allow a Scotch marriage to have validity in England; for it does not immediately appear how the dissolution and the constitution of the contract should come in conflict, though diametrically op-

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posite principles are applied to each. But only mark how that conflict arises, and how, in fact and in practice, it must needs arise as long as the diversity of the rules applied is maintained. When English parties are divorced in Scotland, it seems easy to say, "We give no validity to this proceeding in England, leaving the Scotch law to deal with it in that country; and with its awards we do not in anywise interfere." But the time speedily arrives when we can no longer refuse to interfere, and then see the inextricable confusion that instantly arises and involves the whole subject. The English parties are divorced—they return to England, and one of them marries again; that party is met by *Lolley's Case*, and treated as a felon. So far all is smooth. But what if the second marriage is contracted in Scotland? and what if the issue of that marriage claims an English real estate by descent, or a widow demands her dower? *Lolley's Case* will no longer serve the purpose of deciding the rights of the parties; for *Lolley's Case* is confined to the effects of the Scotch divorce in England, and professes not to touch, as, indeed, they who decided it had no authority to touch, the validity of that divorce in Scotland. Then the marriage being Scotch, the *lex loci* must prevail by the cases of *Compton v. Bearcroft*, and *Ilderton v. Ilderton*. All its consequences to the wife and issue must be dealt with by the English Courts, and the same judge who, sitting under a commission of gaol delivery, has in the morning sent Mr. Lolley to the hulks for felony, because he remarried in England, and the divorce was insufficient; sitting at *Nisi Prius* in the afternoon, must give the issue of Mr. Lolley's second marriage an estate in York-

shire, because she re-married in Scotland, and must give it on the precise ground that the divorce was effectual. Thus the divorce is both valid and nugatory, not according to its own nature, or the law of any one state, but according to the accident whether a transaction which follows upon it, and does not necessarily occur at all, chanced to take place in one part of the island or in the other; and yet the felony of the husband depended entirely upon his not having been divorced validly in Scotland, and not at all upon his not being divorced validly in England; and the title of the wife's issue to the succession, or of herself to dower, depends wholly upon the same husband having been validly divorced in that same country of Scotland.

Nor will it avail to contend that the parties marrying in Scotland after a Scotch divorce is in fraud of the English rule, as laid down in that celebrated case. It may be so—but it is not more *in fraudem legis Anglicanæ*, than the marriage was in *Compton v. Bearcroft*\*, which yet has been held good in all our Courts. Neither will it avail to argue that the indissoluble nature of the English marriage prevents those parties from marrying again in Scotland as well as in England; for the rule in *Lolley's Case* has no greater force in disqualifying parties from marrying in Scotland, where that is not the rule of law, than the English Marriage Act has in disqualifying infants from marrying without banns published, and yet these may, by the law of England, go and marry validly in Scotland. Indeed, if there be any purely personal disqualification or incapacity caused by the law, and which, more than any other, may be said to travel about with the party,

\* Bull. N. P. 113.

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it is that which the law raises upon a natural *status*, as that of infancy, and fixes on those who, by the order of nature itself, are in that condition, and unable to shake it off, or by an hour to accelerate its termination.

If, in a matter confessedly not clear, and very far from being unincumbered with doubt and difficulty, we find that manifest and serious inconvenience is sure to result from one view, and very little in comparison from adopting the opposite course, nothing can be a stronger reason for taking the latter. Now surely it strikes every one that the greatest hardships must occur to parties, the greatest embarrassment to their rights, and the utmost inconvenience to the Courts of Justice in both countries, by the rule being maintained as laid down in *Lolley's Case*: the greatest hardship to parties — for what can be a greater grievance than that parties living *bond fide* in England, though temporarily, should either not be allowed to marry at all during their residence here, or if they do, and afterwards return to their own country, however great its distance, that they must be deprived of all remedy in case of misconduct, however aggravated, unless they undertake a voyage back to England, ay, and unless they can comply with the parliamentary forms in serving notices; — the greatest embarrassment to their rights — for what can be more embarrassing than that a person's *status* should be involved in uncertainty, and should be subject to change its nature as he goes from place to place; that he should be married in one country, and single, if not a felon, in another; bastard here, and legitimate there? — the utmost inconvenience to the Courts — for what inconveni-

ence can be greater than that they should have to regard a person as married for one purpose, and not for another — single and a felon if he marries a few yards to the southward — lawfully married if the ceremony be performed a few yards to the north — a bastard when he claims land — legitimate when he sues for personal succession — widow when she demands the chattels of her husband — his concubine when she counts as dowable of his land?

It is in vain to remind us of the opportunity which a strict adherence to the *lex loci*, with respect to dissolution of the contract, would give to violators of our English marriage-law. This objection comes too late. Before the validity of Scotch marriages had been supported by decisions too numerous and too old for any question, this argument *ab inconvenienti* might have been urged and set against those other reasons which I have adduced, drawn from the same consideration. But we have it now firmly established as the law of the land, and daily acted upon by persons of every condition, that, though the law of England incapacitates parties from contracting marriage here, they may go for a few minutes to the Scotch border, and be married as effectually as if they had no incapacity whatever in their own country, and then return, after eluding the law, to set its prohibitions at defiance without incurring any penalty, and to obtain its aid without any difficulty in securing the enjoyment of all the rights incident to the married state. Surely there is neither sense nor consistency in complaining of the risk, infraction, or evasion arising to the English law from supporting Scotch *divorces*, after having thus given to the

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Scotch *marriages* the power of eluding, and breaking and defying that law for so many years.

I have now been commenting upon *Lolley's Case* on its own principle — that is, regarding it as merely laying down a rule for England, and prescribing how a Scotch divorce shall be considered in this country, and dealt with by its Courts. I have felt this the more necessary because I do not see, for the reasons which have occasionally been adverted to in treating the other argument, how, consistently with any principle, the Judges who decided the case could limit its application to England, and think that it did not decide also on the validity of the divorce in Scotland. They certainly could not hold the second English marriage invalid and felonious in England without assuming that the Scotch divorce was void even in Scotland. In my view of the present question, therefore, it was fit to show that the Scotch Courts have a good title to consider the principle of *Lolley's Case* erroneous even as an English decision. This, it is true, their Lordships have not done; and the Judgment now under appeal is rested upon the ground of the Scotch divorce being sufficient to determine the marriage-contract in Scotland only.

I must now observe, that supposing (as may fairly be concluded) *Lolley's Case* to have decided that the divorce is void in Scotland, there can be no ground whatever for holding that it is binding upon the Scotch Courts on a question of Scotch law. If the cases and the authorities of that law are against it, the learned persons who administer the system of jurisprudence are not bound to regard — nay, they are not entitled to regard — an English decision, framed by English judges upon

an English case, and devoid of all authority beyond the Tweed.

Now, I have no doubt at all that the Scotch authorities are in favour of the jurisdiction, and support the decision under appeal; but I must premise that, unless it could be shown that they were the other way, my mind is made up with respect to the principle, and I should be for affirming on that ground of principle alone, if precedent or *dicta* did not displace the argument. The principle I hold so clear upon grounds of general law, that the proof is thrown, according to my view, upon those who would show the Scotch law to be the other way.

In approaching this branch of the question, it is most important to remark, that there may be a very small body of judicial authority upon a point of law very well established in any country; nay, that oftentimes the less doubtful the point is the fewer cases will you find decided upon it. Thus no one denies that the Scotch Consistorial Court had, ever since its establishment upon the reformation, been in the practice of pronouncing sentences of divorce for adultery. The Catholic religion was abolished by the Parliament of Scotland in 1560; and three years after that important event we find a statute made, the Act 1563, c. 74, in which, after a preamble expressing great and lively horror of the "abominable and filthie vice of adultery," (an opinion perhaps more sincere in the estates of Parliament than in the Queen), it is declared to be a capital offence if "notour" (notorious) and all other adultery is to continue punishable as before, but with an express saving of the right to "pursue for divorcement for the crime of

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“adultery conform to (according to) the law.” For above two centuries the jurisdiction thus recognized by the statute had been exercised by the Consistorial Courts. Nor was any objection whatever made to the want of jurisdiction over parties, in respect of their domicile having been foreign or the marriage contracted abroad. In truth, the view which the law took of adultery as a crime punishable with even the severest of penalties, seems almost to preclude any such exception. If a person were indicted under the statute for notour adultery committed in Scotland, he clearly never could have defended himself by showing he had been married in England, and was only temporarily a resident in Scotland; so there seems never to have been any such distinction taken in giving the injured party the civil remedy against the offender by dissolving the marriage. That Englishmen temporarily residing in Scotland have been in use to sue for divorces from marriages contracted in England, ever since the intercourse of the two countries became constant by the union first of the Crowns and then of the Kingdoms, is a fact of much importance, and it is not disputed. The importance of it is this — that the Courts, administering the law of divorce have, with a full knowledge that they were dissolving English marriages, never inquired further than was necessary for ascertaining that the Pursuers and Defenders had acquired a domicile in Scotland, and then exercised the jurisdiction without scruple, and without any hesitation. This is a clear proof that the law, the Scotch law, was always understood among its practitioners and by the Judges of the country, as the present decision supposes it to be; and such a long

continued and unqualified practice is a fully better proof of what that law is, than even a few occasional decisions *in foro contentioso*. It would be a dangerous thing to admit that generally recognized and long continued practice should go for nothing, merely because, until a few years ago, no one had brought those principles and that practice in question, and because the judicial decisions in its favour were few in number, and of a recent date. There is every reason to believe that in this, as in most other particulars, the more ancient law of England was the same with that of our northern neighbours. Between the Reformation and the latter end of Queen Elizabeth's reign, it was held that the Consistorial jurisdiction extended to dissolve *à vinculo* for adultery.\*

It was, however, apparently not till 1789, that the question of jurisdiction was raised *in foro contentioso*, by the case of *Brunsdon v. Wallace*, 9 February, 1789. But here a question was made upon the sufficiency of the *forum originis* to found a jurisdiction. The husband, before marriage, had left Scotland without any intention of returning, and so had the wife. The Court were much divided, and the judgment was given with an express reference to the circumstances of the case, of which the absence of the defender, the husband, from Scotland, when and long before the suit was commenced, must be regarded as one. Nevertheless, as the majority of the Court considered the *forum originis* of both parties sufficient to found the jurisdiction, I should have thought this a decision against the principles which I deem to be recognized by later cases had it stood untouched by these.

\* 2 Burn, E. L. 503.

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*Pirie v. Lunan*, 8 March, 1796, is, I believe, the next case; but it was the case of a Scotch marriage between Scotch parties, and only raised the question of *forum*; for both were domiciled in England. The Court sustained the jurisdiction *ratione originis*. This decision clearly proves little or nothing any way in the present question. And the same may be said of *Grant v. Pedie*, which occurred in 1825. So *French v. Pilcher*, 13 June, 1800, turned on the wife, the defender, being an Englishwoman, and resident out of Scotland, and the adultery chiefly committed abroad; and accordingly, it does not touch, and hardly even approaches, any of the points now in dispute.

In *Lindsay v. Tovey*, the Court of Session sustained the jurisdiction in all respects; and though the parties had been living separate under a deed. It is true that your Lordships, on appeal, remitted the case; and that the death of one of the parties prevented any further proceedings. The ground of the remit was twofold—that the domicile of the husband appeared to your Lordships (acting under Lord Eldon's advice) to be in England; and that *Lolley's Case* had not been considered by the Court below. Upon that case, Lord Eldon pronounced no opinion, but he certainly intimated a doubt, and I can inform your Lordships (having been Counsel in the cause, and having, at the argument, given his Lordship a note of the judgment in *Lolley's Case*) that he said, "It is a decision on which we probably shall hear a good deal more."

But since *Lolley's Case* was decided, with the doctrine there laid down fully before them, and after maturely considering it, the Scotch Courts

have repeatedly affirmed the jurisdiction in all its particulars. Those cases to which I particularly refer were decided in 1814, and the two or three following years. *Lovett v. Lovett*, and *Kibblethwaite v. Kibblethwaite*, both of the same date, 21st Dec. 1816, are those to which I shall particularly advert. In both cases the marriage was had in England; in both the parties were English by birth and by domicile; in both the suit was brought by the wife for the husband's adultery; and the only domicile in Scotland being that required to give the Courts jurisdiction, the Commissaries in both refused to divorce, on the ground not of the indissolubility of the English marriage, but the insufficiency of the Scotch residence; in both the Court of Session, after the fullest discussion, with one dissentient voice, and that turning upon the question of domicile, sustained the jurisdiction, and remitted to the Commissaries to proceed with the divorce.

Upon the other cases, of *Edmonstone v. Edmonstone*, and *Butler v. Forbes*, I need not dwell in detail. The state of the judicial authority on this question is fully given in the work of Mr. Ferguson, one of the most experienced of the Scotch Consistorial Judges. After referring to all the cases, the words of that learned person, though not to be cited as an authority, are well worthy of attention, as the testimony of a Judge sitting for so many years in the Scotch Consistorial Court, and speaking to its uniform and established practice, twenty years after *Lolley's Case* had been determined here. Mr. F. says, "According to these precedents, the municipal law of Scotland is also now applied by the Consistorial Judicature in all

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“ cases of divorce, without distinction, whether  
 “ the parties are foreign or domiciled subjects and  
 “ citizens of this kingdom ; whether, when foreign,  
 “ the law of their own country affords the same  
 “ remedy or not, and whether they have contracted  
 “ their marriage within this realm, or in any other ;  
 “ provided only that they have become properly  
 “ amenable to the jurisdiction in this *forum*. None  
 “ of these last mentioned cases, nor indeed any  
 “ other from Scotland, in which a question of in-  
 “ ternational law could be raised for trial and  
 “ judgment, having hitherto been appealed, the  
 “ rule has for a period of more than ten years  
 “ stood as fixed by them, and the subsequent  
 “ practice has furnished additional instances of its  
 “ application.”

I think I need scarcely add that this current of judicial authority, and still more the uniform practice of the Scotch Courts, unquestioned ever since the Reformation, establishes clearly the proposition in its largest sense, that the Scotch Courts have jurisdiction to divorce when a formal domicile has been acquired by a temporary residence, without regard to the native country of the parties, the place of their ordinary residence, or the country where the marriage may have been had.

But although it was necessary to complete the view which I have taken of this important question, that I should advert to the cases which bear upon it in all its extent, there is no necessity whatever for our assenting to the proposition in its more general and absolute form, for the purpose of the case now before us. That is the case of a marriage contracted in England between a man Scotch by both domicile and birth, and a woman about to

become Scotch by the execution of the contract. It is moreover the case of a suit instituted in the Scotch Courts, while the pursuer had his actual domicile in Scotland, and his wife had the same domicile by law. To term a marriage so contracted an English marriage, hardly appears to be correct. I am sure it is if not wholly a Scotch contract, at the least a contract partaking as much of the Scotch as of the English. This in my judgment frees the case from all doubt; but as I have also a strong opinion upon the more general question, an opinion not of yesterday, nor lightly taken up, I have deemed it fitting that I should not withhold it from your Lordships, and the parties, and Court below, upon the present occasion.

*Lord Lyndhurst.* — My Lords, my noble and learned friend has entered so minutely into the consideration of this question, that it will not be necessary for me, in the observations which I feel it my duty to make, to occupy much of your time.

My noble and learned friend has very justly stated that this is a question of great importance not only to the parties immediately concerned in it, but also to the public. It is some time since it was argued at your Lordships' bar. I have on different occasions directed my attention to it, and it is now my duty to communicate to your Lordships the result of the opinion I have formed respecting it.

If I considered that your Lordships were sitting distinctly in judgment upon *Lolley's Case*, I should not conceive that you could with propriety proceed to a decision without requiring the advice and opinion of the Judges.

The facts of that case were very shortly these :

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Lolly married in England, he afterwards went to Scotland, and, by the decision of a competent Court in that country, obtained a sentence of divorce. He afterwards returned to England, and married a second time, his former wife being still alive. A prosecution was instituted against him, he was found guilty: he set up, by way of defence, that the marriage with his former wife had been dissolved by a competent Court in Scotland. The defence and the validity of it were submitted to the consideration of the Twelve Judges. They were of opinion that the sentence of divorce in Scotland could not, as far as England was concerned, have any effect. He was found guilty, was sentenced, and, to a certain extent, underwent punishment.

That was a decision unanimously pronounced by the Twelve Judges of England, by men many of them of great experience and learning; and I certainly should not have ventured to recommend your Lordships to reverse a decision so sanctioned, had that been the direct question before you, unless upon grave consideration and consultation with the King's Judges.

It is suggested by my noble and learned friend, that the noble earl, who presided for so many years in the Court of Chancery, entertained doubts as to the propriety of that decision. The expressions which I have seen attributed to that noble Judge I think hardly warrant such a conclusion; and, as the noble earl was at the time when the judgment was pronounced at the head of the law of the country, as he must have known of the decision, he would not, I think, had he entertained serious doubts respecting it, have suffered the

party so convicted to have undergone any part of the punishment inflicted on him by the sentence.

But, my Lords, the question as to the soundness of the decision in *Tolley's Case* came before my noble and learned friend when he held the great seal. My noble and learned friend had been counsel in the case; he therefore was apprised of all the circumstances relating to it, and it is material that I should inform your Lordships of what my noble and learned friend said with respect to it. In the case of *M'Carthy v. De Caix*, which came before my noble and learned friend in 1831, and in the elaborate judgment which he pronounced on that occasion, he observed: "It is fully established by the solemn opinion of all the Twelve Judges, in a fully argued and most maturely considered case, that a foreign divorce could not operate to dissolve, or in any manner be made to affect, an English marriage." My noble and learned friend proceeds thus: — "The point was argued before the Twelve Judges, including some of the most learned Judges of our day, my Lord Ellenborough, Lord Chief Justice Gibbs, Chief Baron Thompson, and several others. Mr. Justice Bayley, Mr. Baron Wood, and Mr. Justice Le Blanc, some of the most eminent and able lawyers that I have ever known in Westminster Hall. After hearing this case argued during Term, and at Serjeants' Inn after Term, they gave a clear, decided, and well-weighed opinion, all in one voice, finding that no divorce, or proceeding in the nature of a divorce, or tending towards a divorce had in any foreign country, Scotland included, could dissolve the *vinculum matrimonii*, or contract of marriage, in England,

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“ and they sentenced *Lolley* (and here is another  
 “ mistake into which the noble and learned Judge  
 “ has fallen, as if there was so much doubt that  
 “ they did not carry the sentence into execution);  
 “ he was sentenced to seven years’ transportation,  
 “ and sent to the Hulks for one or two years.”

“ I hold it, therefore, to be perfectly clear that  
 “ that decision in *Lolley’s Case*, when I look at the  
 “ case itself, and the circumstances preceding, ac-  
 “ companying, and following it, stands as the law  
 “ in Westminster Hall to this day. It is still more  
 “ the law when I remind you of another matter  
 “ which the noble and learned Judge forgot at the  
 “ time he decided the case, and threw some doubt  
 “ on *Lolley’s Case*, which he had looked at, as if it  
 “ had never been recognized in subsequent cases.  
 “ That noble and learned Judge was Lord *Eldon*.  
 “ It has been uniformly recognized in Westminster  
 “ Hall, but above all, it has come over and over  
 “ again in discussion before the same noble and  
 “ learned Judge himself,”—that is Lord *Eldon*,  
 I believe. “ In the case of P — and L — ,  
 “ another case, in two cases, the very year after,  
 “ argued at great length by Mr. Justice *Holroyd*  
 “ on one side, and myself on the other, before  
 “ Lord *Eldon*, and to which he paid most exem-  
 “ plary attention, and where he took a note of the  
 “ very words in which *Lolley’s Case* was decided,  
 “ Lord *Eldon* had that case before him, and he  
 “ followed it on deciding those two cases.”

Such is the statement of my noble and learned  
 friend; I must therefore repeat, that if we were  
 called upon to overturn that decision, and to pro-  
 nounce it to be erroneous, respecting which I wish  
 to be understood as giving no opinion, your Lord-

ships would not think it right to proceed to judgment without a distinct review of that case upon argument in the presence of the Judges, that we might be advised by them whether that decision is or is not agreeable to the law of England ; but, my Lords, we are sitting here to decide a question of Scotch, and not of English law. We are sitting here as a Scotch Court of Appeal, bound to decide according to the law of that country.

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If *Lolley's Case*, however, be law, and if the decision in the Court of Scotland, which we are now reviewing, be also law, this consequence must follow, that after the decree of divorce is pronounced, Sir George Warrender will be able to marry again in Scotland. He would then have a wife in Scotland, and he would have a wife also in England. Such would be the state of things arising from the conflicting law of the two countries : other consequences, which my noble and learned friend has pointed out, and circumstances of an extraordinary and very inconsistent nature would follow.

But we must still decide the case which is before us according to the law of the country from which it comes. If the law be conflicting, it is for Parliament to interfere to remedy the mischiefs consequent on such conflict. The question, and the sole question is, whether by the law of Scotland administered in Scotland by the judges of Scotland, this divorce be, or not, a legal divorce ? We are sitting here in England, and we must be cautious not to suffer ourselves, on that account, to be influenced and governed by the principles of English law. The question is, whether the decision, pronounced in Scotland by the Judges of that country, is conformable to the



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law of Scotland? We are a Scotch Court of Appeal as far as relates to Scotch Cases, and an English Court of Appeal as far as relates to English Cases; and this brings me directly and distinctly to the consideration of the question before us.

As my noble and learned friend has stated, the first point is the question of domicile; unless these parties were domiciled in Scotland, the Court had no jurisdiction. But the question of domicile is admitted for the purpose of the present argument; it is admitted that Sir George Warrender, at the time of his marriage, and from that time up to the commencement of this suit, was a domiciled Scotchman. We are to take this fact as the basis of the argument. The admissions are in writing signed by the counsel on both sides. Sir George Warrender, during the whole of this period, was a domiciled Scotchman. The consequence resulting from this is, that Lady Warrender, by the very act of marriage, became domiciled in Scotland. It cannot be disputed that the domicile of the husband becomes the domicile of the wife: but reliance is placed on the deed of separation. I apprehend that that instrument does not affect the question of domicile at all. The husband and wife cannot by any agreement between themselves vary the law as to domicile. It is a legal consequence of the marriage tie; and after all, what is the separation? My noble and learned friend very correctly, according to my view of the subject, stated, that as far as relates to the separation between the parties, it is nothing more than a mere permission to Lady Warrender to live separate. It has no binding obligation. The only things binding in this deed

are those clauses which relate to pecuniary engagements. She may sue him, or he may sue her, notwithstanding the agreement, for a restitution of conjugal rights. A pledge not to institute such a suit is no legal bar to the right to institute it; and an agreement such as this is nothing more than a permission to the wife to reside where she may think proper: but this does not alter her legal domicile, though her actual residence be changed; her legal domicile remains precisely as it was.

I am aware that in the case of *Tovey* and *Lindsay* in this House, Lord Eldon threw out some doubts as to the effect of a deed of separation on the domicile. I have attended to that doubt, and to the suggestion of that noble and learned Earl, with all the attention that every thing falling from him deserves; but I am obliged at last to come to this result, that the deed of separation makes no difference at all in this case; that, notwithstanding the agreement between the parties to live separate, the domicile of the wife follows the domicile of the husband: the one cannot be separated or detached from the other.

The next point for consideration is, as to the place where the supposed adultery is alleged to have been committed; and what my noble and learned friend says is very true,—there is no evidence whatever to show that Lady Warrender has in any respect misconducted herself. The present is a mere preliminary question. The fact must be assumed, but assumed merely for the purpose of the argument. There is no imputation, from anything in this case, on the character of Lady Warrender: she may be as pure and as spotless as any woman in the world.

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But it is objected, though very slightly, that the adultery, or alleged adultery was committed abroad. It is clear, however, from all the decisions, that there is nothing in this objection. Your Lordships well know that it is no answer to a civil action for damages in this country which may be equally maintained, or a proceeding had in the Ecclesiastical Court, whether the adultery be committed here or abroad; and it is precisely the same in Scotland. I mention the point because it has been stated that reliance was placed upon this circumstance in some of the cases, but there is no ground for the objection.

Then, my Lords, we come to the third and main point, namely, is it competent to the Courts of Scotland to pronounce a sentence of divorce between parties married in England? The Scotch Courts consider this as a question settled: marriage, they observe, is a connection recognised in all Christian countries; and they say, and I think they say with propriety, "That they are not prevented from pronouncing a sentence of divorce "*à vinculo matrimonii* in that country, if the parties are domiciled there, merely because a remedy to the same extent may not be given in the country where the marriage was celebrated. It is a question as to the remedy for a breach of the nuptial engagements,—for the violation of a duty; and the law of every country may affix such penalty as it deems proper for a breach of that duty." When we wish to ascertain what is the law of that country, we look to the decisions of its Courts as evidence of it; and I believe it never was questioned or doubted, till *Lolley's Case*, by any lawyer in Scotland, that without reference

to the country where the marriage was celebrated, if the parties were domiciled in Scotland, it was competent to the Court of Scotland to divorce *d vinculo matrimonii*.

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But if your Lordships will allow me (as it is a question of great importance), I will refer very shortly to the cases on this subject. They extend over a period of more than a century, and in no instance, until the question was raised in *Lolley's Case*, was the authority of the Courts of Scotland ever doubted in that country.

The first case to which I shall refer, is the case of *Gordon and Eaglesgraff* in 1699; there the marriage was in Holland; adultery was charged, and the only question was as to the fact of the adultery. There was no inquiry as to the law of Holland, no question whether the parties could be divorced *d vinculo matrimonii* in that country, or not: the sole point which the Court thought it necessary to ascertain was, whether, in fact, adultery had been committed.

The next case occurred in 1726. The parties were married in Ireland. The law of Ireland, as far as respects the present question, is the same as the law of England. A sentence of divorce was pronounced on proof of adultery. No doubt was entertained as to the authority of the Court to dissolve *d vinculo matrimonii*, if the adultery were proved.

The third case is that of *Scott and Boucher*, in 1731. There was afterwards another case in 1787. where the parties had been married at Boston, in America: the law of marriage, as far as respects the present question, was, at that period, the same at Boston as in England; and again, in a contested

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suit, there was a divorce upon proof of the adultery; and in none of the cases to which I have referred was any doubt expressed as to the law. It is true that some of these decisions were pronounced in absence. My noble and learned friend has already observed on this circumstance. It tends, I think, only more strongly to show that the law was considered as so settled and ascertained that no doubt existed on the subject.

Then came *Brunsdon* and *Wallace*, in 1789, where the parties had been married in London: that was a case very sharply contested; the question was not raised; but it was open to the parties to have raised it; no Scotch lawyer supposed that it could be raised, or that it was tenable; the sole question agitated was, as to the domicile *ratione originis*, whether in that case it was sufficient to sustain the jurisdiction.

In the case of the *Duchess of Hamilton*, in the year 1796, the parties had been married in England; the adultery had been proved, and there was a divorce. Down to this period the decisions are uniform.

Then, came the case of *Lindsey* and *Tovey*, in 1817; and before the appeal in the case of *Lindsey* and *Tovey*, *Lolley's Case* was decided. *Lindsey* and *Tovey* was decided by the Commissaries. There was a Bill of Advocation to the Lord Ordinary, and he confirmed the decision of the Commissaries: there was a further appeal to the Court of Session, and that Court confirmed the previous decision of the Commissaries and the Lord Ordinary, and then the case came to this House. In the course of the discussions here, *Lolley's Case* was mentioned; it was mentioned at

at the bar, and some discussion took place with respect to it, but the main point was this : — where was the domicile? The pursuer was an officer domiciled originally in Scotland, but he had taken a house at Durham, and had remained there for the education of his children. Lord Eldon was inclined to think from the facts as they appeared, that Durham should be considered his domicile, and not Scotland; he thought that question had not been sufficiently considered in the Courts below, *Lolley's Case* also having been decided after the judgment in Scotland; the point in that case had not been before the Court of Session; and he thought also, there was some doubt as to the operation of the deed of separation upon the question of domicile. These three points occurred to the mind of the learned Judge, and to Lord Redesdale, who sat with him.

Under these circumstances, it was thought advisable that the case should be sent back to the Court of Session, in order that it might consider these questions, and see what effect they would have upon the Judgment. The pursuer died a short time afterwards, and the case fell to the ground — there was no further proceeding in it. Several decisions afterwards took place, to which my noble and learned friend has referred: they are all collected in Mr. Fergusson's book, where they are stated with great accuracy. There was, among others, the case of *Rogers and White*, in 1811; the parties had been married in England, and there was a decree for a divorce.

There was afterwards another case, in which ultimately a decree for a divorce *à vinculo matrimonii* was given. The question came before Lord

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Meadowbank, a judge of great learning and experience, and I should recommend any person who doubts what the law of Scotland is, upon the point, to read his Judgment in that cause. After he had reviewed the case and sent it back to the Commissaries, Judgment of divorce *à vinculo matrimonii* was pronounced.

Then followed the case of *Hilary* and *Hilary*, of *Sugden* and *Jolly*, of *Tolk* and *Russell Manners*, of *Humphrey* and *Wyatt*, in 1814, where the parties had been married in Wales; and the case of *St. Aubin* and *Banks*, in the same year.

All these cases were decided according to what had been uniformly considered as the law of Scotland. The case of *Gordon* and *Bye* come on afterwards, and I mention it particularly, because in that case, there was a division among the Commissaries. In consequence of what had occurred here respecting the decision in *Lolly's* Case, a majority of the judges of that Court were of opinion that they had no right to interfere by divorce *à vinculo matrimonii* with an English marriage. The case went afterwards before Lord Meadowbank, who gave an opinion upon it corresponding with his former Judgment — the execution was stayed, and it was intended to carry the case before the Court of Review.

This brings me to the case of *Edminston*, which is the only further decision with which I shall trouble your Lordships; the course pursued with respect to it was precisely what Lord Eldon meant to take place in the case of *Tovey* and *Lindsey*; he thought the question was of so much importance that the opinion of all the Scotch Judges should be taken upon it. In the case of *Edminston*, the

question was distinctly raised. The question put was this :— Is it a valid defence against an action of divorce in Scotland, on account of adultery committed there, that the marriage was celebrated in England? So that your Lordships see the question was distinctly put to the Judges — not the Judges of one division alone — not the Lord Ordinary alone — but to both divisions, and the Lord Ordinary. The Fifteen Judges were unanimously of opinion that, according to the law of Scotland, and a long and uniform course of decisions, it was competent for the Courts of Scotland to pronounce a sentence of divorce *à vinculo matrimonii*, whatever the country in which the marriage might have taken place, and without reference to the remedies for adultery in such country. In the book to which my noble and learned friend referred your Lordships, you will find the argument of the Judges of the second division were fully given. I have read them with attention, and they have satisfied me that such has been the uniform course of proceeding in Scotland, and such the acknowledged law of that country.

I have already observed that the decisions of the Courts of a country are evidence of what the law of that country is. The decisions of the Courts of Scotland are uniform. I have traced them from 1696 down to the present time. It appears, indeed, that the decision in *Lolley's Case* did for the moment introduce a doubt in some quarters, but it was soon, and I think effectually, removed by the decision of the fifteen Judges of Scotland in the case of *Edminston*. Looking, then, anxiously at the subject, and inquiring, as well as I have been able, from every source, what the law of Scotland

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is, I feel that sitting here, as your Lordships do, as a Scotch Court of Appeal from the decision of Scotch Judges, I should act very inconsistently with my duty were I to advise your Lordships to reverse the decision which has been come to by the Court below. I consider the question of domicile to be clear. The other question as to the citation was almost abandoned at the bar. My noble and learned friend went fully into it. I think it is free from doubt—The domicile of Sir George Warrender is admitted, and the domicile of Lady Warrender follows as a matter of course, unless the deed of separation makes a distinction. I am of opinion that the deed of separation makes no distinction. The domicile being then settled, the place where the supposed adultery was committed being, in my judgment, immaterial, and the uniform course of decision in Scotland being such as I have stated, I think it impossible that any serious doubt can be entertained with respect to this judgment. We are to decide according to the law of Scotland.

Upon the decision in *Lolley's Case* I pronounce no opinion. If it be correct, and any inconvenience should result from the conflict of the law of the two countries, the legislature must apply the remedy: these are considerations which ought not to lead you to reverse the judgment in this case, if you are satisfied of its correctness. Inconveniences arising from a want of correspondence of the law of Scotland with that of England, have from time to time been remedied by the legislature. Lord Eldon mentioned his intention of bringing in some bill for the purpose of reconciling other differences between the laws of the two countries. It is the legislature alone that is competent to ap-

ply the remedy. For these reasons, I humbly advise your Lordships to affirm the judgment.

*Lord Brougham.* My Lords, I agree entirely with my learned friend. I think I stated that this question cannot break in upon *Lolley's Case* in whatever way it is disposed of; that it rests on grounds of its own: *Lolley's Case* may have been decided rightly by the English law, while this case has been decided rightly by the Scotch law, *Lolley's Case* touching the effects in England of Scotch divorces of English parties, and this case only touching the effects in Scotland, of Scottish divorces of Scottish parties, so far I agree with what my learned friend has stated. If in the Court of Chancery I said what is given in the note produced, I meant this — Whatever my own opinion may be on the decision of *Lolley's Case*, I am not at liberty, sitting as a Judge of one of the inferior Courts, and not of the supreme Court of Appeal, I am not at liberty to dispute that decision. But I may now give my opinion on *Lolley's Case* sitting in the supreme Court of Appeal. However, it is not before this Court, and the present case is not at all affected by it. I quite agree that it is for the legislature to apply an apt and efficient remedy to any inconvenience that arises from the present conflict of the laws of the two countries. That conflict may form a very fit subject for the consideration of your Lordships at some other time.

*Lord Lyndhurst.* I read those passages from the printed papers referring to the judgment of the noble and learned lord. I do not find them in any book: I do not know the source from which they are taken.

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*Lord Brougham.* It must have been from a short hand writer's note; I never said it, except in this printed appeal case. It is manifestly very inaccurate, and not even intelligible.

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A correct statement of the judicial observations made by Lord Brougham (the Lord Chancellor) in *M'Carthy v. De Caix*, so far as they relate to this question, has been extracted from Vol. 2. of the reports of Russell and Mylne, beginning at p. 615, and is here subjoined.

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*The Lord Chancellor.* — (After a short preliminary statement.)

The case was this. A person of the name of Tuite contracted a marriage in this country with an Englishwoman, the marriage being solemnised in England; but he being himself a Dane by birth, fortune, and domicile. He afterwards removed his wife from this country, the *locus contractus* (with which he appears to have had no further connection), to the dominions of the King of Denmark, where his subsequent domicile continued to be; and in that country the marriage was dissolved by a valid Danish divorce, as far as such a divorce could dissolve it, but which I may observe in passing, could by the law of this country have no operation, as was fully established by the opinion of the twelve judges, who solemnly decided after argument, that no proceedings in a foreign court, could operate to dissolve or affect a marriage celebrated in England,

During the lifetime of Mrs. Tuite, and subsequently to the divorce, certain arrears of an annuity which she enjoyed under the marriage settlement, accrued, or were said to have accrued, amounting at her death to the sum of 7000*l.* Prior to that event, a litigation in this Court had been commenced, to which the claim to these arrears was incident. After the decease of both husband and wife, the result of the suit was, to put the parties representing her in possession of those arrears, and two sums were actually recovered and paid to them, amounting in the whole to 3631*l.*; and the whole of the question in this cause arises, with respect to those sums, it being a conflict between the respective personal representatives of Mr. and Mrs. Tuite, upon the effect of a correspondence between Mr. Tuite and Mrs. Delattre, the sister of Mrs. Tuite, and her legal adviser Mr. Pinniger.

Upon that correspondence the whole question in dispute ap-

pears to turn. On the death of Mrs. Tuite, letters are written by Mrs. Delattre representing her to have died in very poor circumstances; so much so that her debts were said to amount to more than all the little property she left could satisfy, even including her wearing apparel. Mr. Tuite in reply, writes two letters to Mrs. Delattre, and in answer to her application to that effect, he at first refuses to execute a power of attorney to receive any funds that may become due, denying his rights, because he insists it was a good divorce, (nor indeed had it been decided till *Lolley's Case* in 1812-13, that a foreign divorce was of none effect, as regards an English marriage;) and he afterwards says: "If such a power is required, I would not have any thing; her family is most heartily welcome;" and his language in another letter is — "I claim nothing, I would accept of nothing; nevertheless, in case it may by the form of your law be requisite, I give Messrs. S. and L. a power to act for me." How entirely he relied upon the marriage as being in other respects at an end, is manifest from the fact, that besides giving up the claim to the property of the deceased lady, he calls her by the name of Mrs. Trefusis, which was the name she bore before she became his wife. It must, therefore, at least be admitted, that in giving this which is called his renunciation, the husband laboured under two capital errors, one of law, the other of fact: the one not superinduced by any suppression of circumstances on the part of Mrs. Delattre and her agent; whereas the other may be said to have arisen from their not disclosing facts, which there is every reason to believe they must have known; the latter an error which if they did not create, they had at least, to a certain degree, a share in maintaining.

When I state that the first of these was a great error in point of law, it is of the highest moment that no doubt should exist on a matter of such paramount importance. I find from the note of what fell from Lord Eldon on the present appeal, that his Lordship laboured under considerable misapprehension as to the facts in *Lolley's Case*; he is represented as saying he will not admit that it is the settled law, and that therefore he will not decide whether the marriage was or not prematurely determined by the Danish divorce. His words are, "I will not without other assistance take upon myself to do so."

Now, if it has not validly, and by the highest authorities in Westminster Hall been holden, that a foreign divorce cannot dissolve an English marriage, then nothing whatever has been

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established. For what was *Lolley's Case*? \* It was a case the strongest possible in favour of the doctrine contended for. It was not a question of civil right, but of felony. *Lolley* had *bonâ fide*, and in a confident belief, founded on the authority of the Scotch lawyers, that the Scotch divorce had effectually dissolved his prior English marriage, intermarried in England, leaving his first wife. He was tried at Lancaster for bigamy, and found guilty; but the point was reserved, and was afterwards argued before all the most learned lawyers and judges of the day, who after hearing the case fully and thoroughly discussed, first at Westminster Hall, and then at Serjeant's Inn, gave a clear and unanimous opinion, that no divorce or proceeding in the nature of divorce in any foreign country, Scotland included, could dissolve a marriage contracted in England; and they sentenced *Lolley* to seven years' transportation. And he was accordingly sent to the hulks for one or two years; though in mercy, the residue of his sentence was ultimately remitted. I take leave to say, he ought not to have gone to the hulks at all, because he had acted *bonâ fide*, though this did not prevent his conviction from being legal. But he was sent notwithstanding, as if to shew clearly that the Judges were confident of the law they had laid down; so that never was there a greater mistake than to suppose that the remission argued the least doubt on the part of the Judges. Even if the punishment had been entirely remitted, the remission would have been on the ground that there had been no criminal intent, though that had been done which the law declares to be felony.

I hold it to be perfectly clear therefore, that *Lolley's Case* stands as the settled law of Westminster Hall at this day: it has been uniformly recognised since, and in particular it was repeatedly made the subject of discussion before Lord Eldon himself, in the two appeals of *Tovey v. Lindsay* † in the House of Lords, when I furnished his Lordship with a note of *Lolley's Case*, which he followed in disposing of both those cases, so far as it affected them. That case then settled two points: first, that no foreign proceeding in the nature of a divorce, in an ecclesiastical court, could effectually dissolve an English marriage; and, secondly, that a Scotch divorce is not such a proceeding in an ecclesiastical court as to bring the case within the exception in the Bigamy Act, for which nothing less than the sentence of an English ecclesiastical court is sufficient.

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\* See Russ. & Ry. C. C. 237.

† Dow. 117.

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## IRELAND.

(COURT OF CHANCERY.)

HENRY SEYMOUR MOORE VANDELEUR, Esquire, ANNE FRANCES VANDELEUR, spinster, and ALICE STEWART, otherwise VANDELEUR, widow, the younger children of the Right Hon. JOHN ORMSBY VANDELEUR, deceased - - - } *Appellants;*

CROFTON MOORE VANDELEUR, Esq. }  
the eldest son of the said JOHN ORMSBY VANDELEUR, and the Right Hon. THOMAS BURTON VANDELEUR, one of the Judges of His Majesty's Court of King's Bench in Ireland, and CROFTON FITZGERALD, Esq., executors of the last will and testament of the said JOHN O. VANDELEUR - - } *Respondents.*


By a marriage settlement, in consideration of the wife's fortune, and to make a suitable provision for her and her issue, N. the settlor conveyed lands in trust upon the usual limitations in marriage settlements, with terms for raising portions of younger children, with a proviso for cesser of the terms upon satisfaction, &c. It is then declared and agreed that the lands &c. shall, in the first place &c., stand and be charged with the several sums due for the portions of the brothers and sisters of N. the settlor amounting to 15,900*l.*, and by the judgments and bonds set forth in a schedule to the deed, and amounting to 12,700*l.* The deed contained the usual covenants for title, &c. In the covenant against incumbrance

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were the following exceptions: "other than and except the jointure of 700*l.* for the mother of V. the settlor, and other than and except the several sums due by judgments or bonds to the different persons in the schedule hereunto annexed, amounting to 12,700*l.*, and also other than and except the sum of 15,000*l.* (the portions due to the brothers and sisters of V. the settlor); of all and every of which said several sums the said lands and premises are hereby charged," and except quit rents and leases. In the covenant for further assurance there was by reference a similar exception "except as before excepted." Some of the debts named in the schedule were debts of the settlor. The others were debts of his father.

The settlor by his will directed that a judgment entered on a bond of A. B. (which was one of the bond debts of the testator mentioned in the schedule to the settlement,) should be satisfied by his executors, the same having been paid. He died in 1828, having during his life paid off part of the 15,000*l.* charged on the estate under his father's settlement for his younger brothers and sisters, and also some of his father's debts, and some of his own debts, mentioned in the schedule, in case of his settled estates. Held, reversing the decree in the Court below, that the debts enumerated in the schedule to the settlement, and such parts of the 15,000*l.* as remained unpaid, were a charge on the lands, which were declared to be the primary fund for payment of those debts, and that the personal estate was exonerated.

  
 BY an indenture of release, bearing date the 17th day of November, 1800, and made between the Right Honourable John Ormsby Vandeleur of the first part, the most noble Charles Marquis of Drogheda and the Lady Frances Moore, youngest daughter of the said Marquis of Drogheda, of the second part, Richard Earl of Shannon and the Honourable Francis Nathaniel Burton of the third part, and William Burton and Thomas Burton Vandeleur, Esquires, of the fourth part, (being the settlement executed in contemplation of the marriage then intended to be, and which was shortly

after duly had and solemnized, between the said John Ormsby Vandeleur and the said Lady Frances Moore,) certain hereditaments in the counties of Limerick and Clare, of which the said John Ormsby Vandeleur was seised in fee, were conveyed and assured by the said John Ormsby Vandeleur, from and after the said marriage, to the use of the said John Ormsby Vandeleur for his life, with remainder to trustees to preserve contingent remainders: and after the decease of the said settlor to the use of the said William Burton and Thomas Burton Vandeleur, for the term of ninety-nine years from the said settlor's decease, to secure the jointure of Lady Frances Moore; and subject thereto, and to the said jointure, and the powers and remedies for payment thereof, to the use of the last named trustees, for a term of 500 years, for raising the sum of 10,000*l.* as portions for the younger children of said marriage; and subject thereto to the use of the first and other sons of the marriage, severally and successively according to their respective priorities in tail male, and in default of such issue to the use of the settlor in fee.

The settlement was expressed to be made in consideration of the intended marriage, and of the sum of 6000*l.*, the marriage portion of Lady Frances Moore, and for making a suitable provision for Lady Frances Moore and her issue by John Ormsby Vandeleur, and for settling and assuring the hereditaments thereafter released upon such trusts, and to and for such uses, intents, and purposes, and under and subject to such provisos, limitations, and agreements as were thereafter mentioned, and declared of and concerning

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the same ; and after the limitations before stated, and the declarations of the trusts of the said two terms of 99 years and 500 years, and immediately following the proviso for cesser of the latter term, the settlement contained the following declaration : —

“ Provided always and it is hereby declared and  
 “ agreed by and between the parties to these pre-  
 “ sents, that all and every of the said towns, lands,  
 “ tenements, hereditaments, and premises hereby  
 “ granted and conveyed shall in the first place  
 “ stand and be charged and chargeable, and the  
 “ same are hereby declared to be charged with the  
 “ several sums due for the portions of the brothers  
 “ and sisters of the said John Ormsby Vandeleur,  
 “ amounting to the sum of 15,900*l.*, and by judg-  
 “ ments and bonds hereinafter mentioned, and  
 “ which said several sums are particularly set forth  
 “ in a schedule hereunto annexed, and amount to  
 “ the sum of 12,700*l.*”

Then followed a power for the settlor to jointure future wives, and a power of leasing, and then the covenants for title : the covenant against incumbrances was expressed as follows : — “ And  
 “ that free and clear or freely and clearly ac-  
 “ quitted, exonerated, and discharged or other-  
 “ wise, by the said John Ormsby Vandeleur, his  
 “ heirs, executors, and administrators, well and  
 “ sufficiently saved, defended, kept harmless, and  
 “ indemnified of, from, and against all and all man-  
 “ ner of former and other gifts, grants, bargains,  
 “ sales, mortgages, jointures, dowers, right and title  
 “ of dower, portions, uses, trusts, wills, entails,  
 “ statutes, recognizances, judgments, extents, ex-  
 “ ecutions, and of and from all and singular other

" estates, titles, troubles, charges, and incum-  
 " brances whatsoever had, made, done, committed,  
 " or suffered by him the said John Ormsby Vande-  
 " leur or by any of his ancestors, or by any person  
 " or persons claiming or to claim from, by, or under  
 " them, or any of them, or under their or any of  
 " their acts, means, assent, consent, or procure-  
 " ment, other than and except the jointure of 700*l*.  
 " yearly provided for Alice Vandeleur widow,  
 " mother of the said John Ormsby Vandeleur, dur-  
 " ing her life, and other than and except the seve-  
 " ral sums due by judgment or bonds to the differ-  
 " ent persons in the schedule hereunto annexed,  
 " amounting in the whole to the sum of 12,700*l*.  
 " and also other than and except the sum of  
 " 15,900*l*, the portions due to the brothers and  
 " sisters of the said John Ormsby Vandeleur, with  
 " all and every of which said several sums the said  
 " lands and premises are hereby charged, and other  
 " than and except the quit rents issuing and pay-  
 " able out of the said lands and premises, and other  
 " than and except such leases of the said lands and  
 " premises as have been heretofore really and *bonâ*  
 " *fide* made to the tenants thereof." And the  
 covenant for further assurance made a similar ex-  
 ception by reference to the foregoing covenant  
 "(except as before excepted").

Some of the debts enumerated in the schedule  
 to the settlement were debts previously contracted  
 by the settlor, and to which he was personally  
 liable. The rest were debts contracted by his father  
 and predecessor in estate, Crofton Vandeleur.  
 The 15,900*l*. for portions was charged on the es-  
 tates by the marriage settlement and will of his  
 father, Crofton Vandeleur.

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John Ormsby Vandeleur being also seised in fee of the lands of Moyne and Ballymote (exclusively of the settled estates), and being also possessed of a large personal estate, made and published his last will and testament in writing, bearing date the 7th of August, 1828 (duly attested for the passing of real estates), and thereby, after sundry bequests to his wife and daughters, devised the lands of Moyne and Ballymote to Thomas Burton Vandeleur and Crofton Fitzgerald Crofton until the Respondent, Crofton Moore Vandeleur, should attain the age of twenty-seven years, to be applied as thereafter directed, and subject thereto to the use of his said son Crofton Vandeleur for life, with several remainders over: and as to the rents of the lands of Moyne and Ballymote, so to be taken and received by Thomas Burton Vandeleur and Crofton Fitzgerald, the testator directed that the same should be invested from time to time in government funds, and also the dividends payable thereon, to accumulate until his said son Crofton should attain the age of twenty-seven years, or, if he should die before attaining that age, until such time as he would have attained that age in case he had lived; and the testator directed such rents and profits, and all accumulations thereof, to form part of his residuary estate, to be disposed of as thereafter directed. The testator then directed (among other things) that a certain judgment entered on one Andrew Browne's bond (which was one of the bond debts of the testator mentioned in the schedule to the settlement,) should be satisfied by his executors, the same having been paid: and as to all the rest, residue, and remainder, of the testator's

property, of what nature or kind soever, (except his books, pictures, and plate,) he left the same to Thomas Burton Vandeleur and Thomas Crofton Fitzgerald, in trust for his younger child or children, his or their heirs, executors, and administrators, as to so much thereof as with the sum he, she, or they should be entitled to under his (the testator's) marriage settlement would make the sum therein mentioned for each and every of his said children, such children, if more than one, to take as tenants in common, and not as joint tenants; and as to the residue thereof, in trust to pay the interest or annual produce to his (the testator's) wife during her life, and after her decease in trust for his younger child or children, his, her, or their executors and administrators, in equal shares if more than one, and as tenants in common. The testator appointed the Respondents Thomas Burton Vandeleur and Crofton Fitzgerald executors of his will, and the Respondent Thomas Burton Vandeleur guardian of his children until they should respectively attain the age of twenty-one years.

John Ormsby Vandeleur died on the 9th of November, 1828, without having altered or revoked his will (which was shortly afterwards proved by the executors therein named), leaving Lady Frances Vandeleur his widow, and four children, viz., the Respondent Crofton Moore Vandeleur, his eldest son by Lady Frances, and (as such) tenant in tail male of the settled estates under the limitation to the first son of the marriage, and the Appellant Henry Seymour Moore Vandeleur his only other son, and two daughters, viz., the Appellants Anne Frances Vandeleur and Alice Stewart widow, him surviving.

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John Ormsby Vandeleur, during his life-time, paid off part of the sum of 15,900*l.* to his brothers and sisters, and also some of his father's debts comprised in the schedule to the settlement, and also some of his own debts contained in the schedule, and declared such payments to be in ease of his settled estate.

On the 4th of January, 1831, a bill was filed by the Respondents Thomas Burton Vandeleur and Crofton Fitzgerald, the executors of the testator, in the High Court of Chancery in Ireland, against the Respondent Crofton Moore Vandeleur and the Appellants and Lady Frances Vandeleur (since deceased), stating, amongst other things, that the testator's widow and younger children insisted that the debts or sums paid off by the testator during his life, he being tenant for life only of the lands charged, should still be considered as subsisting charges, and should form part of the testator's personal estate, but that the Respondent Crofton Moore Vandeleur, on the contrary, insisted that such payments were made in exoneration of the estates; and as to such of the scheduled debts as were the testator's own, and remaining unpaid at his death, that his personal estate was the primary fund for payment of them. The bill prayed that the rights of the several parties to the personal estate of the testator might be declared by the decree of the Court, and that the Plaintiffs, the executors, might be entitled to administer the same pursuant to such decree, and that the trusts of the testator's will as to his personal estate might be carried into effect, and that if any accounts should appear to be necessary for that purpose that the same might be decreed to be taken.

The Respondent Crofton Moore Vandeleur filed his answer to the bill on the 6th of May, 1831, thereby insisting, among other things, that as to such of the debts as were the proper debts of John Ormsby Vandeleur, and had not been paid by him, the Respondent Crofton Moore Vandeleur was entitled to have the same paid out of the personal estate of John Ormsby Vandeleur, as being the primary fund for the payment of the debts of John Ormsby Vandeleur.

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Replication having been filed, evidence was given by the Plaintiffs in the suit to prove the settlement and the payment made by the settlor of part of the sum of 15,900*l.* and some of the debts in the schedule to the settlement, and to prove the will of the testator: and evidence was given by the Respondent Crofton Moore Vandeleur to prove that the payments made by the settlor as aforesaid were in ease of the settled estate.

The cause was heard on the 12th of May, 1832, before the Lord Chancellor of Ireland, and by the decree of that date it was referred to Mr. Connor, one of the Masters, to inquire and report as to the debts specified in the schedule annexed to the settlement, whether any and which of them had been paid, by whom all such debts respectively were contracted, whether judgments had been entered on any and which of the debts, and, if so, whether any and which of such judgments had been satisfied or directed so to be, and all particulars relating to such debts.

The Master made his report pursuant to the decree, bearing date the 22nd of June 1832, and thereby found, amongst other things, that the debts specified in the schedule were as stated in

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the list set out in his report, which list comprised, amongst other sums, the following items: viz.,

No. 1. Bond and warrant of John Ormsby Vandeleur to Mrs. Dorothea Burton, dated 9th of January 1796, in the penalty of 2,400*l.* conditioned for the payment of £1,200 0 0

No. 6. Bond of John Ormsby Vandeleur to Mr. John Daxon in the penalty of 6,800*l.* conditioned for the payment of - - - £3,400 0 0

No. 8. Bond of same to the Reverend Mr. Whitty, in the penalty of 1,000*l.*, conditioned for the payment of - - - - - £500 0 0

The Master further found that the three debts last specified as Nos. 1. 6. and 8. still remained unpaid (besides two sums of 400*l.* and 600*l.*, marked Nos. 2. and 3. in the list last referred to, being sums due on bonds of the testator's father Crofton Vandeleur, and comprised in the schedule to the settlement): and he found that the sum of 1,200*l.*, No. 1. in the list, mentioned to be secured by the bond and warrant of John Ormsby Vandeleur to Mrs. Dorothea Burton, was a debt contracted by John Ormsby Vandeleur and secured by the bond of John Ormsby Vandeleur to Mrs. Dorothea Burton, bearing date the 9th day of January 1796, and that no judgment had been entered on the bond: that the sum of 3,400*l.* (No. 6. in the list), mentioned to be due on the bond of John Ormsby Vandeleur to John Daxon, and the sum of 500*l.* (No. 8. in the list), mentioned to be due on the bond of John Ormsby Vandeleur to the Reverend Mr. Whitty, were debts

contracted by John Ormsby Vandeleur; and the Master further found that the sum of 3,400*l.*, in the schedule mentioned to be due on bond to Mr. John Daxon, was composed of three several sums secured by separate bonds perfected by John Ormsby Vandeleur to John Daxon; one dated 30th of July 1796, for 2000*l.*, conditioned for payment of 1000*l.*, upon which judgment was entered in his Majesty's Court of Exchequer in Ireland as of Hilary Term 1797; one other dated 1st August 1797, for 2,800*l.*, conditioned for payment of 1,400*l.*, upon which judgment was entered in said Court of Exchequer as of Easter Term 1799; and the third of the bonds dated 2nd April 1800, in the penalty of 2000*l.*, conditioned for payment of 1000*l.*, upon which judgment was entered in the Court of Exchequer as of Michaelmas term 1810: and that the said several judgments were in Easter term, 1825, duly assigned to certain persons therein named, in whom they were then vested: and the Master further found, that the sum of 500*l.*, stated in the list to be due on the bond of John Ormsby Vandeleur to the Reverend Mr. Whitty, was a debt secured by the bond of John Ormsby Vandeleur to the Reverend Irmine Whitty, bearing date the 15th of August, 1796, in the penalty of 1000*l.*, and that judgment was entered on that bond in his Majesty's Court of Common Pleas in Ireland as of Trinity term, 1799, and that such judgment was then outstanding.

No exceptions being taken to the report, it was confirmed; and the cause was heard on further directions before the Lord Chancellor of Ireland on the 1st and 10th of December, 1832, and the 14th and 15th of January, 1833, and on the 25th

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of May, 1833, when his Lordship, by an order of that date, declared that as to such of the debts and charges in the schedule to the settlement of 1800 as were paid off by the testator in his life-time, the same were not subsisting charges on the settled estates, but that the same were paid off in ease of such estates; and it was further ordered and declared, that as to the sums of 1200*l.*, 3400*l.*, and 500*l.* in the list or schedule to the Master's report mentioned, and found to have been debts contracted by John Ormsby Vandeleur, and to be still due and unpaid, the personal estate of John Ormsby Vandeleur was the primary fund for the payment of the same, and the Plaintiffs admitting assets in their hands sufficient, after the payment of the other debts, funeral expenses, and express pecuniary legacies bequeathed by the will of John Ormsby Vandeleur, it was ordered that the Plaintiffs (the Respondents Thomas Burton Vandeleur and Crofton Fitzgerald) out of the surplus of the personal estate of John Ormsby Vandeleur should pay the same; and it was further ordered that the Plaintiffs should be paid their costs in the cause out of the personal estate of John Ormsby Vandeleur, and that the several Defendants should abide their own costs.

The appeal was from this order, complaining only of that part of it which declares the testator's personal estate the primary fund for payment of the said debts, and directs payment accordingly.

For the Appellants, Mr. *Pemberton* and Mr. *Knight*.

The principle of decision which is applied to cases arising upon wills, does not apply to this case. The different funds in the former case belong to

the same person. Here the personal estate belonged to the settlor, the real estate to the son. Some of the charges as the father's debts did not belong to the settlor. These it is admitted under the decree are to be borne by the real estate. There is no reason why the debts should be introduced and provided for by the settlement, except for the relief of the personal estate. *Noel v. Noel*\*, is a strong authority on this point. All debts not already liens were made so by the deed. If the estate had been sold it must have been for a price *minus* the amount of the debts. The purchaser could not in that case contend that he was not bound to pay them; and if the executor paid the debts, he might come upon the purchaser for repayment. The claimants here are not volunteers. Children having a title to portions charged upon land by a deed of settlement are purchasers as much as if they had advanced money. The intent of the deed was to settle what remained after payment of the charges. Here the estate was the son's, and the father's assets were not to be liable. The bonds were not originally charges, but were coupled with those which were so. The object of the charge of his own debts in a family settlement cannot be for the benefit of creditors. There was no contract with them. Could the settlor in his life-time have been compelled to pay in exoneration of his settled estates? according to the covenants, rightly construed, the real estate is to exonerate the personal.

For the Respondents, Mr. *Jacobs* and Mr. *Parry*.

There is no sufficient evidence on the face of the settlement of the 17th November, 1800, to

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\* MSS. Cases, 1823; and 12 Price, 214.

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shew that it was the intention of the settlor to relieve his personal assets, or to transfer from his personal estate to his real estate (made the subject of such settlement), the primary liability to pay the debts in question; and as the settlement does not affect to deal with the settlor's personal estate in any manner, or to make any provision for the younger children, or other objects of the settlement, which might be payable thereout, there is nothing in the deed to raise a necessary inference of such an intention on the part of the settlor.

The lands made the subject of the settlement were already liable to payment of such of the sums mentioned in the schedule as were charges on the lands, or secured by judgments against the settlor; and the clause declaring that the lands should "in the first place be charged, &c." was, in effect, with regard to those sums, only an exception of previous incumbrances, or a declaration that the conveyance to the uses of the settlement was made, as the settlor had alone power to make it, subject and without prejudice to prior charges; and the words "first place" were not meant to have any reference to the settlor's personal estate, or to make the lands the fund for payment, as between them and the personal estate; but only that the sums already charged, and the sums thereby made charges, should stand, with respect to the limitations of the settlement, as a prior mortgage would. The exception in the covenant against incumbrances was inserted only as a common form, where the estate is conveyed subject to any specific prior incumbrances, and was not meant to relieve the settlor's personal estate from the payment of any

debts, or in any way to affect the administration of his assets.

Although real estate may be considered the fund primarily liable, in cases in which charges have been created in their origin and nature inherent on the land, and for the payment of which the land was the security contemplated by the parties, that principle does not extend to cases in which (as in the present) there have been pre-existing debts contracted by the settlor, and of which his personal estate has received the benefit. In order to exempt the personal estate from its primary liability, a clear intention must appear: a dealing by the debtor with real estate as being liable (as was the case here with respect, in particular, to the debts secured by judgments against him,) is not sufficient evidence of an intention to make such real estate the exclusive or primary fund for payment; and with regard to those sums, and also such of the settlor's debts as were not secured by judgments, in order to take from the personal estate its primary liability, there must be an intention not only to charge the settled estate but to discharge the personal estate.

The issue of a marriage, claiming under the marriage settlement, are objects of the settlor's bounty; and the case of vendor and vendee, where the purchaser who takes by his contract, subject to existing incumbrances, deducts from the purchase money a sum equivalent to the amount of such incumbrances, does not govern the present case, in which there is nothing to prevent the application of the ordinary rules relative to the administration of the assets of a deceased debtor.

In reply: It is argued that there is no difference between a deed and will as to the construction of

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words. This cannot be supported as a general proposition. This question is mentioned by Lord Eldon in *Noel v. Noel*. \* The reasons for the decision in *Serle v. St. Eloy* † are not satisfactory : but the judgment might be supported by circumstances not appearing in the report. The testator as between himself and creditors could not exonerate the personal estate. But with respect to volunteers he might do so. In a will a man disposes of his own property gratuitously ; but marriage settlement is a matter of contract. For this reason the Court upon marriage articles model the limitations by the intent. In wills there is nothing to guide the Court but the words. *Serle v. St. Eloy* has at most only established the rule as to a will, if more, it is opposed and overruled by *Noel v. Noel* : so much of the estate as is subject to the charge passed from the settlor upon the execution of the settlement.

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The judgment was moved by *Lord Brougham*, as follows : — John Ormsby Vandeleur being seised in fee-simple of estates in the counties of Limerick and Clare, on his inter-marriage in 1800 with the Lady Frances Moore, in consideration of that marriage, and of 6,000*l.*, her portion, conveyed these estates to trustees in trust for himself for life, and after his decease for two terms, to raise younger children's portions, and secure a jointure to his widow ; remainder in strict settlement on the first and other sons of the marriage, with remainder to the settlor in fee. A proviso is expressly added to the following effect, covering the whole estates put in settlement : " Provided

\* *Ante*, p. 169.

† 2 P. W. 386.

“ always, and it is hereby declared and agreed by  
 “ and between the parties to these presents, that  
 “ all and every of the said towns, lands, tenements,  
 “ hereditaments, and premises hereby granted and  
 “ conveyed, shall, in the first place, stand and be  
 “ charged and chargeable, and the same are hereby  
 “ declared to be charged with the several sums due  
 “ for the portions of the brothers and sisters of the  
 “ said John Ormsby Vandeleur, amounting to the  
 “ sum of 15,900*l.*, and by judgments, and bonds  
 “ hereinafter mentioned, and which said several sums  
 “ are particularly set forth in a schedule hereunto  
 “ annexed, and amount to the sum of 12,700*l.*”

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A covenant follows against incumbrances, “ with  
 “ the exception of the several sums due by judg-  
 “ ments or bonds to the different persons in the  
 “ schedule hereunto annexed, amounting in whole  
 “ to the sum of 12,700*l.*, and also other than and  
 “ except the sum of 15,900*l.*, the portions due to  
 “ the brothers and sisters of the said John Ormsby  
 “ Vandeleur, with all and every of which said  
 “ several sums the said lands and premises are  
 “ hereby charged.”

There is also a covenant for further assurance, but with the like exception. It says, “ Except as  
 “ before excepted,” referring to the exception in the preceding covenant.

What the settlor may have done afterwards signifies not; nevertheless he showed that he considered he had burthened his settled estates with the debts; for on paying off part of the portions (15,900*l.*) of his brothers and sisters, and also part of the debts in the (12,700*l.*) schedule, he declared such payments to be made in ease of the settled estate.

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It is further to be observed, that part of the debts in the original schedule, and part of those paid off, were contracted by the settlor's father, and part were his own debts.

A bill having been filed by the executors of John Ormsby Vandeleur, against his eldest son, and the younger child and the widow, to have the rights of the parties declared, the trusts of the will carried into effect, and the necessary accounts taken, and answers having been put in by the Defendants, it was referred to the Master to ascertain what debts, comprised in the schedule, remained unpaid, and by whom these were contracted. The Master reported that there were three bonds unpaid, one of 1200*l.*, one for 3400*l.*, and one for 500*l.*, in all of which John Ormsby Vandeleur was the obligor; the two last only being secured by judgments; the first by a warrant, on which no judgment had been entered up.

This report being confirmed, the question which alone was agitated between the parties below, or is in contest before your Lordships, came before the Lord Chancellor of Ireland for his decision—Whether the estates which the settlor's eldest son, Crofton Moore Vandeleur, took under the settlement, were so charged with the debts in the schedule, reported still due to the amount of 5100*l.*, that they fell upon him, or were a charge on the personal estate, to be borne first of all by that estate in exoneration of the real? His Lordship held that the personal must exonerate the real estate, as being the fund primarily liable, and directed that the surplus of this personal estate should be so applied, after payment of the debts not in the schedule, the funeral expenses and

“express pecuniary legacies.” His Lordship did not allow any party costs except the plaintiffs, the executors, who were to be paid out of the personal estate.

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This decree is brought here by appeal; the noble and learned Lord who made it having expressed considerable doubt respecting the question, and having recommended the judgment of this House being taken; and I am of opinion that the decree is erroneous and ought to be reversed, excepting only as regards the costs of the suit below.

As between volunteers, there can be no doubt whatever of the rule; nor can there be any doubt of what amounts to a case of volunteers, or how it would be as between debts and an estate partly real, partly personal, but the real estate continuing in the disposal of the deviser at his death, and only charged by his will with the debts, without any words of exclusive charge, or words exonerating the personalty. In all such cases the personal estate is primarily liable, and must relieve the real, on which debts are charged, unless they have been charged on that realty exclusively in exoneration of the personalty.

This exclusive charge may be either in express terms or by manifest intention, gathered from construction, the intention of the testator being the sole rule; and even if the parties here were to be considered as equally volunteers, we should be entitled to examine the instrument in question, with the view of ascertaining whether or not the personalty was intended to be exonerated. Hence this case may be regarded in two lights. First, as if the questions lay between volunteers; and next



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upon the ground of the holder of the estates being a purchaser under the settlement.

I. If we had the case of volunteers to consider, the question would turn upon the intention of the settlor to relieve the personal estate and charge the real exclusively. Has he shown such an intention in this case? The words are strong; the estates are declared to be, in the first place, charged with the debts which are set forth in a schedule for the purpose of specifying to what charge precisely the settled estates are to be subject, what burthen they are to bear. In the covenants too he excepts those same debts. He covenants that the objects of the settlement, the estates, are free, and discharged, and saved harmless against all debts and charges, except the jointure of his mother, and except the debts scheduled; and he covenants for further assuring, but not against the debts scheduled. It may be observed, too, on the principle of *noscitur e sociis*, that the only exceptions besides these debts are those of the family debts or brothers' portions and the mother's jointure, both of which are unquestionably charged on the estates and on those only; the personalty has nothing to do with them.

But for this exception in these covenants for quiet enjoyment and further assurance, the personal would have been liable in respect of incumbrances, as well as in respect of deficient conveyance. What then is the object of the exception? Plainly to exempt the personal estate from eventual burthen in the one case, and certain liability in the other, from those debts owing. There seems, therefore, some reason to hold that, even regarded

as a case of volunteers, the personalty might be held exonerated in the peculiar circumstances of this settlement. But the other is the principal ground of my opinion.

II. The tenant in tail in possession takes under the settlement, and he takes as a purchaser. Suppose Mr. Vandeleur had sold his estate, and left it charged with the debts in the hands of the purchaser, it is plain that the purchaser would have been liable not only to pay the creditors if they had gone against him, but if they had gone against the executors or other personal representatives of the vendor, the purchaser would have been liable to repay whatever was thus obtained. Now how is this different from the present case?

It is said that the purchaser must have been liable, because he had paid so much less price for an estate so much the less valuable as the charge amounted to. In all probability he would have done so; but it is not of necessary consequence; he might have had the caprice or the kindness to pay the same price, or he might reckon on all the debts being paid off; and still the estates would have been liable in his hands if they should not be paid; and at all events this circumstance, of the diminished price, is an accident and not a circumstance essential to the question, and which can govern its merits.

The settlor, when he leaves the estate charged, means to give so much less — means to put in settlement so much less property. We never can say that this was not considered by him in his settlement. He would answer — “Had I not charged the debts on those two estates, I should only have put the Limerick estate in settlement,

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“and left out the Clare estate altogether, in which  
 “case I might have sold it and paid the debts.”  
 But is it quite correct to say that the objects of  
 the settlement do not give less in the bargain in  
 consideration of the estate being charged? On  
 the contrary, may it not be considered, that, if  
 they had been free, the Lady Francis Moore’s  
 portion would have been more than 6000*l*? Or  
 if they had been free and so the eldest child had  
 been better off, may we not suppose that her  
 Ladyship would have been satisfied with a smaller  
 jointure? The whole transaction must be viewed  
 together, and all the provisions are parts of one  
 scheme, one plan, one agreement. But it is quite  
 enough to say, that the amount of what is given  
 on either side never can enter into our argument  
 in the consideration of a settlement, because the  
 purchasers under it take not on paying any price,  
 but in a wholly different way. They execute their  
 part of the consideration, as it were, through the  
 parties to the marriage-contract. The settlor was  
 here one of those, and he expressly gives the  
 estate to the settlement subject to the debts, and  
 thereby makes the issue of the marriage take only  
 so much as remains after payment of these. No  
 conceivable distinction can therefore be taken  
 between such purchasers under a settlement and  
 any others; the one class are as little volunteers  
 as the other. The simplest and plainest view of  
 the case seems to be this. What did the settlor  
 convey? What did he put into the settlement of  
 real estate? Was it the whole estates or was it  
 only those estates after deducting certain debts in  
 the schedule? That the amount of these remained  
 undetermined till his death, because he might pay

part of them, (as he did in point of fact,) makes no difference. It only makes the deduction an uncertain sum — the thing deducted, a sum uncertain in amount during his life ; but the thing in respect of which the deduction was to be made was quite clear all the while. It was the debts scheduled, to such an amount that as might remain of them unpaid, that is, whatever of those debts scheduled remained such, remained in existence as debts on his the settlor's decease.

Lastly — It seems impossible to allow this demand or the equities of the parties to be affected by anything that was done by the settlor after his marriage. All rights must be taken to be as they were established at the date of the conveyance, otherwise a party might alter the rights of others by things done after the contract was completed. Hence, neither any directions in his will nor the state of his affairs at his decease could possibly alter the construction, always of course excepting the circumstance of his paying off the debts, for that is expressly contemplated by the word debt, on which the whole is grounded by the nature of the charge. And this last observation applies not merely to any argument sought to be raised on the exoneration of the personalty by express words in the will, in so far as one of the scheduled debts is concerned, and none other — a provision which plainly could never prove anything, because whatever impression the testator and settlor might have had on his mind when he made his will, the only question is what he did long before by the settlement. But the observation applies also to the whole argument for the view taken in the decree, because that view proceeds upon the principle of

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the personal estate continuing liable at the testator's death, and so exonerating the real assets descended.

The cases of *Noel v. Noel*\*, and *Ward v. Waring*†, contain matter which confirms the view which I have felt it necessary to take of this question, though they do not come up to decisions upon the point.

The decree appealed from ought to be reversed, and it should be declared that the debts in the schedule, reported unpaid at the testator's death, are a burthen on the settled estates in the counties of Limerick and Clare, and that the personal estates of the testator in the hands of the executors the plaintiffs are exonerated therefrom. In other respects the decree ought to stand, and no parties have any costs except the executors (plaintiffs), who are to have, according to the decree, their costs of the suit below, and also of this appeal, out of the personal estate.

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It is declared, that the debts reported in the schedule to the Master's report, to be unpaid at the death of the testator, are, and ought to stand as a trust upon the settled estates in the counties of Limerick and Clare, and that the personal estate of the testator, in the hands of the executors, the plaintiffs in this suit, ought to be exonerated therefrom; and it is ordered and adjudged that so much of the decree complained of, as declares the personal estate to be the primary fund for the payment of the several sums of 1200*l.*, 3400*l.*, and 500*l.* therein-mentioned be reversed. And it is further ordered, that the executors the plaintiffs are to have their costs of the suit in the said Court of Chancery out of the personal estate, according to the directions of the said decree, and that they do also have their costs of this appeal out of the same estate.

\* 12 Price, p. 700. D. P. 1823. MSS. † 7 Vesey, 332.

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## ENGLAND.

(COURT OF CHANCERY.)

RICHARD WHITE, FRANCIS JENKS }  
BURLTON, VINCENT WHEELER, } *Appellants* ;  
and JAMES EYSAM GRAHAM - - }

JOB WALKER BAUGH and THOMAS }  
BEALE - - - - - } *Respondents.*

A receiver in order to obtain sureties, enters into an agreement with them, that A. the partner of one of the sureties, shall attend upon the receipt of the rents of the estates, and that they shall be paid into a bank at L., in the name of the sureties; and that all monies to be applied for the purposes of the receivership, shall be drawn for by checks prepared and written by A. and signed by the receiver. This agreement having been acted upon, the bank at L. failed, and a loss was sustained. The account was then transferred to another bank; under the same agreement, when another loss ensued by failure of the bankers. Held, upon petition, that the receiver was responsible for the amount of losses, &c.

IN the month of August, 1820, the Appellant Richard White was proposed and was subsequently appointed to be receiver of the estates of John Salwey, Esquire, deceased, in a cause wherein John Salwey was Plaintiff, and Elizabeth Salwey, and others, were Defendants. Upon his appointment he was required to find two sureties, and the Appellant Francis Jenks Burlton and William Adams (since deceased), who was represented by his executors, the Appellants Vincent Wheeler and James Eysam Graham, agreed to become and be-

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came such sureties, and entered into a recognizance, dated the 10th of November, 1821, in the penal sum of 8000*l.* in the usual form.

The sureties for the receiver, as the condition upon which they consented to become sureties, stipulated with the receiver that the monies which he should receive in his character of receiver should be lodged in some bank, in the names of the sureties, and that all monies to be applied for the purposes of the receivership should be drawn for by checks prepared and written by George Anderson, a solicitor in partnership with William Adams and that the checks so drawn should be signed by the receiver Richard White, and expressed to be "on account of the trustees of the late John Salwey, Esquire," and they further required that Anderson be at liberty to attend with the receiver on the rent days to receive the amount of rents, which it was stipulated should be afterwards paid into the account to be kept with the bankers. These stipulations were acceded to by the receiver, and an account was accordingly opened in the names of the said sureties with the firm of Giles, Edward, and James Prodgers, bankers of Ludlow, and which firm afterwards became Edward Prodgers and Co.

There were some incumbrances affecting the said testator's estates which bore interest, and the bankers had a general authority to pay such interest to the parties entitled to it without drafts being drawn for the same; but with that exception the bankers had no authority to pay any money on account of the receivership, except the same were drawn for by drafts signed by the receiver, Richard White, and expressed to be "on account of the trustees of the late John Salwey, Esquire,"

and they never did pay except on drafts in that form.

All monies received on account of the receivership were paid into the bank of Messrs. Prodgers until they became bankrupts, at which time there was a balance of 1464*l.* 2*s.* 2*d.* in their hands on account of the said receivership. The said sum of 1464*l.* 2*s.* 2*d.* was proved under the commission as a debt due to Richard White as such receiver, upon the joint affidavit of himself and his sureties. Soon after the failure of Messrs. Prodgers an account was opened with Messrs. Coleman, Morris and Sons, of Leominster, in the names of the sureties, and the same arrangements as to the payments of interest and honouring the drafts of the said Richard White the receiver, were made as had existed during the time the account was kept with Messrs. Prodgers.

An account was also opened by the Appellant Richard White with the firm of Coleman and Wellings of Ludlow, bankers, but this was not opened in the names of the sureties; it was headed "An account between the firm and the trustees of the late John Salwey, Esquire," and no such arrangement was made between the receiver and his sureties with respect to the monies placed in this bank as had been made with respect to the monies placed in the other two banks, nor was any arrangement at all made between them as to such monies placed with Coleman and Wellings of Ludlow; but the receiver paid into and drew from this bank at his own discretion, and without any authority from the sureties or either of them to the firm for that purpose. Both these banks failed in the month of March, 1826, when the balance of

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receipts up to Midsummer, 1824, in the bank of Coleman, Morris, and Sons, at the time of their failure, was 1120*l.* 5*s.* 5½*d.*, and that with Messrs. Coleman and Wellings was 259*l.* 2*s.* 8*d.* This sum of 1120*l.* 5*s.* 5½*d.* was proved under the commission against Coleman, Morris, and Sons, in the name of the Appellant Francis Jenks Burlton; and the other sum of 259*l.* 2*s.* 8*d.* was proved under the commission against Coleman and Wellings by the Appellant Richard White. The whole amount of balances of receipts to Midsummer, 1824, in the hands of the three banking houses, was 2843*l.* 10*s.* 3½*d.*

Under the order by which Richard White was appointed receiver he was directed to pay his balances from time to time into the bank of England in the name of the accountant-general of the court of chancery to the credit of the cause; but on the 6th of August, 1824, an order was pronounced on petition whereby Richard White the receiver was directed to pay to Richard Salwey, who was entitled to the rents and profits of the estates for his life, the sum of 617*l.* 17*s.* 7*d.* being the balance reported due from him on the passing his accounts to Midsummer, 1822, and whereby the receiver was also directed to pay the future balances upon his subsequent accounts up to Midsummer, 1824, as the same should from time to time be reported due from him by the master as such receiver unto the said Richard Salwey. On the 20th of July, 1824, the sum of 617*l.* 17*s.* 7*d.*, which was the actual balance reported due from the receiver to Midsummer, 1822, together with 164*l.* 19*s.* 0*d.* due for costs was by a draft transmitted to Mr. George Henry Dansey, the London

agent of Messrs. Adams and Anderson, with the following letter addressed to him :—

“ Dear Sir,

“ Re Trustees of John Salwey, Esq.

“ We send you enclosed a draft for 782*l.* 16*s.* 7*d.*  
“ being the balance of Mr. White’s account as  
“ receiver, up to Midsummer, 1822 ; you will as  
“ before pay 617*l.* 17*s.* 7*d.* part thereof into court  
“ to the credit of the receiver, and 164*l.* 19*s.* 0*d.*  
“ residue to Messrs. Still, Strong, and Rackham.  
“ Be so good as to acknowledge the receipt, and  
“ send us the vouchers as soon as you have pro-  
“ cured the same.”

Mr. Dansey on the 22nd of July, following, paid the sum of 164*l.* 19*s.* 0*d.* as directed by the letter, and at the same time requested Messrs. Still, Strong, and Rackham, who were the solicitors for the trustees of the estates, to give him directions as to the paying into court the said sum of 617*l.* 17*s.* 7*d.* Mr. Dansey was informed by Messrs. Still, Strong, and Rackham, that the agents of Mr. Salwey had requested that the said sum of 617*l.* 17*s.* 7*d.* should not be paid into court, but should be paid to Mr. Salwey, and that a petition for that purpose was about to be presented, and they requested him to hold the money, as they had no directions for paying the same into court. This was communicated to Messrs. Adams and Anderson, who repeated their directions to Mr. Dansey for payment into court of the said sum of 617*l.* 17*s.* 7*d.* Mr. Dansey again called on Messrs. Still, Strong, and Rackham, when they informed him that an order had been pronounced for payment of the money to Mr. Richard Salwey, and that they would send the order to Mr. Dansey

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with a receipt from Mr. Salwey for the sum of 617*l.* 17*s.* 7*d.* Neither this order nor the receipt was ever sent to Mr. Dansey, and in April, 1825, he paid the sum of 617*l.* 17*s.* 7*d.* to the account of Messrs. Adams and Burlton, with Messrs. Coleman, Morris, and Sons, of Leominster.

Richard Salwey died in February, 1825, and his will was proved by the Respondents, two of the executors thereby appointed.

William Adams died, having by his will appointed the Appellants Wheeler and Graham his executors.

Neither the receiver nor his sureties knew of this order until after the death of Mr. Richard Salwey, which happened on the 5th of February, 1825, and it does not appear that the order was in fact drawn up in his life-time.

The will of Richard Salwey was not proved until the month of February, 1827, and no order was obtained for payment to his representatives or to any other person of the monies directed by the order of the 6th of August, 1824, to be paid to him.

On the 26th of July, 1827, the Respondents Job Walker Baugh and Thomas Beale, as the executors of Richard Salwey deceased, presented their petition to the Master of the Rolls, Sir John Leach, stating the principal facts before mentioned, and praying—"That it might be referred to the master (Mr. Cross) to compute interest on the said sum of 2843*l.* 10*s.* 3½*d.* from the time when the same ought to have been paid by the said Richard White, and that the said Richard White, the executors of the said William Adams, so far as they had assets of the said William Adams, and the said Francis Jenks Burlton, might be

"ordered within a month to pay the said sum of  
 "284*l.* 10*s.* 3½*d.* to the petitioners, as the execu-  
 "tors of the said Richard Salwey, and to pay to  
 "the said petitioners the interest on the said sum  
 "of 284*l.* 10*s.* 3½*d.* when the same should be  
 "computed by the said Master within a month  
 "from the date of the said Master's certificate or  
 "report of the amount of such interest, and if  
 "necessary that the said recognizance might be  
 "put in suit for the purpose of compelling the  
 "several payments aforesaid, and that the said  
 "Richard White, the executors of the said William  
 "Adams, and the said Francis Jenks Burlton,  
 "might be ordered to pay the petitioners their  
 "costs of that application, and of the said reference  
 "and incidental thereto, and that his Honor might  
 "be pleased to make such further and other order  
 "therein as the nature of the case might require and  
 "to his Honor should seem just."

Affidavits were filed in support of and opposition to the petition.

The petition was heard on the 29th of November, before the Master of the Rolls, who by order of that date dismissed the petition as against the appellants Francis Jenks Burlton, Vincent Wheeler, and James Eysam Graham, with costs, and referred it to the Master to take an account of the several dividends which had been received on the sum of 1464*l.* 2*s.* 2*d.* proved under the commission of bankrupt awarded against Edward Prodggers, the sum of 259*l.* 2*s.* 8*d.* proved under the commission of bankrupt awarded against Thomas Coleman and Edward Wellings, and the sum of 1183*l.* 5*s.* 4*d.* part of the sum of 2422*l.* 9*s.* 6*d.* proved under the commission awarded

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against Thomas Coleman, John Morris, John Beebee Morris, and Thomas Morris, and to tax the appellants Richard White and Francis Jenks Burlton and Vincent Wheeler and James Eysam Graham, and the defendants Elizabeth Salwey, Theophilus Richard Salwey, and William Radclyffe, their costs of that application, and that the appellant Richard White the receiver should out of what the said Master should find to have been paid to him on account of such dividends pay and retain such several costs when so taxed, and that the said Richard White should pay the residue thereof and all future dividends to be received on the several sums thereinbefore mentioned, as the same should from time to time be received by him, to the said petitioners, and that he should assign all such future dividends to the said petitioners, if required by them so to do, such assignment to be settled by the Master to whom the cause stood referred in case the parties differed about the same.

From that decision the respondents presented their petition of appeal and re-hearing to the Lord Chancellor, before whom the same was heard on the 8th of February, 1831, and on the following day the Lord Chancellor ordered that the order of the 29th of November, 1827, should be reversed, and that it should be referred to the Master to whom the cause stood referred to compute interest upon the said sum of 2843*l.* 10*s.* 3½*d.* the balance of the rents of the estates in the pleadings mentioned due from the appellant Richard White the receiver, after the rate of four per cent. per annum, from the time the same ought to have been paid by the said Richard White, and that the appellants

Richard White and Vincent Wheeler and James Eysam Graham, the executors of William Adams, deceased, one of the sureties of the said Richard White, out of the assets of the said William Adams in a course of administration, and the appellant Francis Jenks Burlton, the other surety of the said Richard White, within a month from the date of the said Master's report to be made in pursuance of that order should pay to the respondents Job Walker Baugh and Thomas Beale, the two executors of the said Richard Salwey deceased, the said sum of 2843*l.* 10*s.* 3½*d.* and what the said Master should certify to be due for interest thereon, and in default thereof it was ordered that the said respondents Job Walker Baugh and Thomas Beale, should be at liberty to put the recognizance of the said appellant Richard White and his sureties in suit.

The appeal was against this order.

For the appellants Mr. *Knight* and Mr. *Loftus Lowndes*.

It was necessary that the monies received on account of the estates should be deposited with bankers for safe custody, and neither the appellant Richard White nor either of his sureties ever applied any part of the receipts from the estates to any other than the purposes of the receivership, or ever mixed up the same with their private accounts; nor did they or either of them derive any advantage from, or make any profit by the receipts, beyond the salary which the appellant Richard White received as such receiver. As to the monies placed in the bank of Messrs. Coleman and Wellings they were not affected by the arrangements made as to the monies deposited in

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the other two banks, and there is no principle upon which the appellant Richard White can be made responsible for the loss sustained on the balance in those banker's hands at the time of their failure.

As to the monies depoosited with the other two firms of Messrs. Prodgers and Messrs. Coleman, Morris and Sons, the arrangements under which the monies were deposited and kept at those two banking houses respectively, were adopted for security only, and not for any advantage to either of the appellants or William Adams deceased, and those arrangements did not place the monies out of the control of the receiver, or under the control of any other person than the receiver, and did not expose the same to any loss, hazard, or prejudice greater than if they had stood in the name of the receiver alone.

A receiver is not liable to make good any loss arising from the failure of a banker, unless some special case of misconduct or neglect shall be proved against him, and in this case none such existed. By the order of the 6th of August 1824, the receiver was prevented from paying his balances into court, and by the death of Richard Salwey and the other circumstances stated, he was prevented from paying those balances to Richard Salwey or any one on his behalf. The direction for payment of interest contained in the order of the 9th of February 1831, is contrary to equity, and is not warranted by any circumstances in this case.

For the Respondent, Mr. *Wakefield*.

The agreement between the Appellants Richard White and Francis Jenks Burlton, and William Adams, deprived the Appellant Richard White of

that control over and possession of the monies which came to his hands as receiver which it was his duty to retain, and prevented him from duly executing his office of receiver, and he kept larger balances in the hands of the bankers than he ought to have done. The repeated failures of the bankers did not induce him to adopt any additional precaution.

It was the duty of Richard White to have obtained orders to enable him to pay, and to have paid such balances, or the greatest part of such balances, into the bank, in trust, in the cause.

The several sums of 1064*l.* 2*s.* 4*d.* and 1979*l.* 7*s.* 10*d.* $\frac{1}{2}$ , making together the sum of 2843*l.* 10*s.* 3*d.* $\frac{1}{2}$  less the dividends which have or may be received thereon has been wholly lost by the default of Richard White.

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*Lord Brougham.* — Richard White, being appointed receiver on the estates of J. Salwey, of whom R. Salwey and another were executors, — was required to find the usual sureties, and proposed William Adams and Francis Boulter, who were approved of. But it afterwards appeared that in order to obtain the suretyship of those persons, and particularly of W. Adams, he had come under an engagement that the rents and profits of the estate should be paid into an account to be opened in the sureties' names, with Messrs. Prodgers, bankers in Ludlow; and that the money in this account should only be drawn out by checks to be filled up in the handwriting of George Anderson, W. Adam's partner. This partner, G. Anderson, used generally to attend the audits, and to receive the rents as White col-

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lected them; and he paid them into the bank. Messrs. Prodgers were also the bankers of the surety Adams and his partner, who kept accordingly their private account with them; but the rents were carried to the account of Adams and Boukter, the sureties. The bank broke soon after the panic, 1825, and a loss of 1464*l.* odd was incurred. The account was then transferred on the same terms and conditions to another bank, that of Coleman and Wellyn, and they, too, broke, with a further loss of 1133*l.* odd, to the estate — in all 2843*l.* odd. The question is, Whether or not the receiver is answerable for this loss; and we may, in the first place, lay out of view the allegation that too great a balance was kept by the receiver in the bank, because an order had been made to pay the money to Mr. Salwey's account; and this, on the death of Mr. Salwey, could not be altered for want of a representative — the executors not having proved, and there being no administration. I leave this consideration out of the question, only because there is no necessity for deciding upon it; and by no means because I would have it to be understood that a receiver is free from the duty of bestirring himself in such circumstances, or that he could not have obtained through the Court, and through the Ecclesiastical authorities, the means of supplying the representation, so as to have the order altered, and the money paid into Court. But it is unnecessary to decide one way or another on this part of the case. The question is, Whether or not the arrangement as to drawing and filling up the checks made the receiver answerable, supposing he incurred no ~~liability~~ <sup>liability</sup> from the amount of the

balance remaining in the bank ; and supposing no other neglect or default to have been committed in guarding the fund ?

Now, it is clearly the duty of the receiver, as an officer of the Court, to keep in his own hands the control over the fund. It is admitted that, if he had parted altogether with that control, he would have been answerable, whether the loss actually incurred could be traced to and connected with that severance, and that want of power over the fund, or not. Does it make any difference that, instead of entirely departing with the control, he gave a *veto* on all his dealings with it to a mere stranger ? The surety's partner, George Anderson, was wholly unknown to the Court, which reposed its confidence in its own officer, the receiver, and looked only to him. The acts of a stranger it had no power over, and could in no respect control or punish.

Consider the position of the fund had a sudden run come upon the bank. White, on hearing it, was bound, in discharge of his official duty, and his duty to the Court, instantly to draw the whole balance out, and put it in a place of greater safety. But the arrangement which he had made prevented him from doing this without the concurrence of Adams's partner, Anderson, who lived at some distance, and who, even had he lived in the same town, might have been absent, or unable from illness to act ; and who, had he been both on the spot and able to write the checks, might have been unwilling, and refused. He might have been disposed to court the favour of his bankers at the risk of the estate. He might have drawn all his own money out and recompensed the banker by

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leaving that of the receivership in; or, to prevent a run which would endanger his own safety in the bank, he might have exposed the receivership fund to jeopardy; and all this he might have done without incurring the least risk himself; for he was not surety, nor in any way bound either to the Court or the receiver. But without making any such supposition, and only considering the provision made for the checks being all filled up by Anderson, only let us ask ourselves how any individual would like, during a run upon his bankers, to have his hand paralyzed by such a *veto* as was given to Anderson? What anxiety would he feel during the delay that must elapse in the interval between the run beginning and the messenger returning with the check filled up for his signature? Is a receiver entitled to place the custody or administration of the fund in a situation which, in the case of any individual dealing with his own estate, would be the source of such disquiet? Again, no person in his own case would make such an arrangement without extreme necessity or ample equivalent. Has any receiver a right to treat the estate committed to his management, and for managing which he is answerable to the Court, and is paid by the estate — in a situation in which neither he nor any one else would voluntarily place his own property? Assuredly the least that can be required by the Court, of its officers is that degree of diligence and care which any man would use in the conduct of his own affairs, and which accordingly the law expects and exacts from all persons acting as agents in the affairs of others for certain pay and reward.

But we have been considering the question as it

would have stood if the *veto* had been given to a stranger, and without any regard to the receiver's own interest, or without a view to any benefit accruing thereby to himself. This was not, however, the case here. The *veto* was given to the surety's partner, and the receiver was thus enabled to obtain his suretyship. Now the Court has a right to a security quite independant of the receivership, and not a security which is to be, as it were, *worked out* of the estate itself. No one would find it a very hard matter to get a surety, if he could give him a control over the funds. The receiver who is paid his poundage ought to be a person so honest and of such a character for honesty, as to obtain security without any such contrivance. A knave might become receiver and obtain sureties, on such terms — for he puts into his surety's hands the power of preventing the money going out of his own. Thus a knavish surety and a dishonest receiver might join in robbing the estate. But it is enough to say that the Court might all the while believe that one man had become bound for the good conduct of another, when he had, in fact, given no such pledge, nor incurred any risk whatever. There is a deception thus practised on the Court, which is induced to believe that a receiver's honesty has been vouched for, when it has not.

Again, an interest is given to the surety or his partner, to court the banker by keeping the balance of the estate account large, and thereby obtaining accommodation on his own private account. Surely no such risk should be run, and any benefit derived from the account should go rather to the estate than to a stranger. But if it

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be said that the surety can only put the receivership fund in jeopardy at his own risk, because the loss will certainly fall on the receiver and himself, if it can be traced to the balance being left too long in the bank, or other place of deposit, then I answer that there are *three* considerations sufficient to destroy the whole force of this observation. *First*, — in this case, it was not the surety but his partner, who had the *veto*. *Secondly*, — neither the surety nor the receiver might have been made liable, although their *laches* in removing the balance might have caused the loss: for there might have been the greatest difficulty in tracing the connection between the loss and the arrangement, or in proving the *laches* of itself to have caused the damage: and, *Thirdly*, — supposing no such difficulty to exist, the Court and the estate have a right to avoid all risks which would call on the surety, and indeed the receiver — for it is by no means enough to say, “If the bank breaks, and “the receiver or the surety have been negligent, “we come upon them.” They may be both insolvent as well as the bank; they may be broke by the failure of the bank; and it is a far more safe thing for the fund that it should not be hazarded at all, than that it should be hazarded and the surety and his principal, the receiver, resorted to in case of a loss. Any man had much rather his money were kept away from the fire, than be told that, in case of its being burned, there is the guarantee or the liability of the man who is sporting with it. His answer is, “Better not risk it at all.” Now, whatever arrangement risks the fire, and makes it more likely that the Court shall have to come upon the receiver and his surety, is a

breach of duty for which the receiver is answerable. Here there was no kind of necessity for the arrangement in question; but it was advantageous to the receiver in the same degree in which it was detrimental to the estate.

What has been said may serve to meet any argument raised upon the circumstance that the *veto* or joint contract is not proved to have occasioned the loss. It must be observed that we never can be quite sure of this; and if parties placed in the situation in which this arrangement put these gentlemen are to be secure against paying, unless they can be shown to have known of the run, or the other dangers attending an investment, they will not be half so curious in their inquiries as they would be in their own case. But, independent of any such consideration, it is to be remarked that on all hands it is most explicitly admitted that the receiver, wholly parting with the control of the fund, would have made him answerable, whether the loss had arisen from thence or no; and this rather differs in degree than in kind, from the fetters imposed upon his own custody and management of the fund, by the receiver sharing it with another, and giving that other as much power over it as himself—such power, indeed, that, without filing a bill in equity, and obtaining an order of the Court, he had no means of drawing out one shilling of the fund, if the person entrusted with the *veto* refused to concur. Nay, he had deprived himself of the power of obeying any order the Court might make *in this cause* respecting the fund.

If it be said that the principle of this decree

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presses hard on receivers, and will discourage men from undertaking the office, I answer, 1st, that this is no matter for the Court's consideration, because the office is one of emolument, and therefore we are not to deal with it as with the office of a trustee: and, 2dly, that nothing here decided can discourage from coming forward honest and solvent men, who mean to perform their duty strictly, and to give the estate the security it has a right to, and to treat the Court with perfect fairness. And such are the persons whom it is best to have for receivers.

I am of opinion, therefore, on the fullest reconsideration of this case, that it was rightly decided; and I have only entered into the argument of it now, because the principle is important, and because my reasons given below are not reported.\* The case was decided when, from the pressure of business, I had not been able to adopt the plan which, for the last three years of holding the Great Seal, I have always pursued, of writing my judgments at length.

Lord LYNTHURST said that he entirely concurred in opinion with Lord Brougham, and concluded by moving that the judgment below be affirmed.

\* The case is now reported under the name of *Salway v. Salway*, 2 Russ. & Mylne, 215.

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## ENGLAND.

(COURT OF EXCHEQUER.)

LOUISA CHAMPERNOWNE and Others *Appellants*;GEORGE BROOKE and Others - *Respondents*.

A bill filed in the Exchequer stated a contract for the sale and purchase of lands of inheritance, subject to numerous life-interests at nominal or conventional rents, with a proviso, (among others,) that in case any of the lives should drop before the completion of the contract the increase in the value of the inheritance, consequent upon the dropping of such lives, should be estimated, and become proportionably an addition to the purchase-money. The bill prayed a specific performance of the contract. Upon a reference as to title and the dropping of lives, &c., the Master, by his report, found the additional value to the estate by the *wearing* as well as the dropping of lives. The plaintiffs, without prosecuting the report, presented a petition of re-hearing, the order for which having been obtained more than six months after the decree became ineffectual. They then presented a petition praying *quasi* by addition to the decree, that the Master might compute the increased value from the wearing of lives, and obtained an order for that purpose, but this order was reversed upon appeal.

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IN Michaelmas term, 1817, James Townsend and others filed a bill in the Court of Exchequer against Arthur Champernowne, stating the following case:—

James Townsend and Elijah Brooke, together with Richard Smith and John Buller Pearse, were, in the month of December, 1810, severally seised



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in fee-simple, as tenants in common, in four equal parts or shares, of the borough, manor, and lordship of Honiton, in the county of Devon, with its rights, royalties, members, and appurtenances, and all the messuages, farms, lands, tenements, and other hereditaments therein; and being desirous of making sale thereof, for the purpose of discharging a large debt or sum of money then due and owing from the said James Townsend, Richard Smith, and Elijah Brooke, to the firm of Hammersleys and Co., bankers, by indenture of appointment duly made and executed, and bearing date the 20th day of December, 1810, limited and appointed the said estates to Richard Nowell, in trust to sell and dispose of all the same by private sale or public auction, or by both or either of those means.

By another indenture or declaration of trust duly made and executed, and bearing date on the same day in December, 1810, Richard Nowell was declared a trustee of the monies to arise by the sale for satisfying to the firm of Hammersleys and Co., or to the person or persons for the time being constituting the firm, the debts due to them: the indenture contained a power for appointing a new trustee.

The estates having been put up to sale by public auction by certain printed particulars, and subject to certain conditions of sale, and bought in on behalf of the vendors, no adequate sum being bid for the same, Arthur Champernowne shortly after agreed to become the purchaser of the estates.

By articles of agreement in writing, bearing date the 11th day of December, 1812, and made be-

tween Charles Scott, of Helstone, in the county of Cornwall, gentleman, of the first part, Sir Christopher Hawkins, of Trewither, in the said county, baronet, of the second part, James Townsend, of the third part, Richard Smith, Elijah Brooke, and James Townsend, bankers and copartners, of the fourth part, John Buller Pearse, of the fifth part, Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank, of the sixth part, Richard Nowell of the seventh part, and Arthur Champernowne of the eighth part, after reciting the indenture of appointment of the 29th day of December, 1810, and also reciting an agreement bearing date the 27th day of May, 1811, and made between James Dean, agent for Messrs. Smith, Brooke, Townsend, and Pearse, of the one part, and Charles Scott, gentleman, of the other part, by which, 1st, The said James Dean, in consideration of the sum of 75,000*l.*, to be paid to the said Messrs. Smith, Brooke, Townsend, and Pearse, on or before the 29th day of December then next thereby agreed that they, the said Smith, Brooke, Townsend, and Pearse, and all other proper and necessary parties, should effectually grant, convey, and assure unto and to the use of such person or persons as the said Charles Scott should appoint, free of all incumbrances whatsoever, except such leases as were specified in the particulars thereof, the inheritance in fee simple of and in all and singular the before-mentioned manor and borough, as set forth and described in the said particulars (thereto annexed), together with all rights, privileges, hereditaments, royalties, and immunities whatsoever. 2dly, That a full and proper abstract should be deli-

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vered, at the vendor's expense, for the inspection of the purchaser, within ten days from that time; and that on such being approved of by counsel, the vendors should execute proper and effectual releases and assurances accordingly, which were to be prepared by the purchaser's solicitor. 3dly, That the rents and profits of all and singular the same manor and hereditaments, should belong to and be received by the purchaser from the said 29th of September then next, provided the said purchase should be then completed; but if the same should be settled, either previously or subsequently to that period, then the purchaser should be entitled to such rents and profits from the time of such settlement; and up to that period respectively all outgoings and charges whatsoever on the said premises were to be paid by the vendors; and that in case of the death of any life or lives after that time, such should be to the vendor's benefit, to be estimated in the usual way: And lastly, it was agreed between the said James Dean and Charles Scott, that immediately on the said purchase being completed, they, the said Smith, Brook, Townsend, and Pearse, should pay, or allow out of the said purchase unto the said Charles Scott the sum of 5000*l.*, for and in lieu of his commission charges, attendances, and expences, respecting the sale of the said property; and further, that a deposit of 10*l. per cent.* on the purchase-money should forthwith be invested in the purchase of exchequer bills, the interest on which should accumulate for the benefit of the vendors in the event of the purchase being completed, and such to be purchased in the

names of two persons, to be mutually appointed by the vendors and purchaser; and in case the contract should not be carried into execution through default of the vendors, the same bills, with the accruing interest, to belong to the purchaser: And also reciting, that the said abstract of title was delivered to the said Charles Scott in pursuance of the said agreement: and also reciting, that the said Arthur Champernowne, by a memorandum dated on or about the 21st day of October, 1811, and indorsed or written at the foot of the said agreement of the 27th day of May, 1811, did agree to become the purchaser of the aforesaid lands in the stead of the said Charles Scott, at or for the price or sum of 70,000*l.*; and thereupon the said Charles Scott relinquished the right and interest to the sum of 5000*l.*, agreed to be paid to him by the said Richard Smith, Elijah Brooke, James Townsend, and John Buller Pearse: And also reciting an agreement, bearing date the 18th day of April, 1812, and made between the said Arthur Champernowne of the one part, and the said James Townsend and Charles Scott of the other part; after reciting, that the said Arthur Champernowne had contracted and agreed for the purchase of the manor, borough, and lordship of Honiton aforesaid, at the price of 70,000*l.*, which said purchase-money was to have been paid, and the purchase completed at Michaelmas then last; and reciting, that the said Arthur Champernowne was desirous of retaining a part only of the said purchase; it was agreed, that Arthur Champernowne should stand as the original purchaser of all those messuages, tenements and lands, parcels of land, therein described,

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at such prices or valuation, as therein mentioned in a certain book or valuation of the whole of the said manor made by James Dean, surveyor, marked C., together with all the waste lands lying within the said road, and around the said lands included therein, at the sum of 500*l*.; and also together with a certain close lying near the church and within the said lane, then occupied by Richard Blake at rent, and not included in the said book; the said purchase to be completed about Midsummer then next: And it was further agreed, that the said James Townsend and Charles Scott should become and stand as the purchasers from Michaelmas then last of all, the remainder of the said property, including the manor, manorial rights, courts leet, and courts baron, and other privileges of the said manor, manorial rights, courts leet, and courts baron, and other privileges of the said manor and borough, at such sum as with the total amount of the monies to be paid by the said Arthur Champernowne would make up the said original purchase-money of 70,000*l*.: And the said Arthur Champernowne did thereby further agree that all monies which he could by himself, or through the said Charles Scott, raise for the completion of the said purchase as originally intended, should, as to any excess beyond the amount of the said Arthur Champernowne's purchase, go in aid of the purchase so agreed to be made by the said James Townsend and Charles Scott, and be secured upon the same, or a competent part thereof; such monies to carry interest at 5*l*. per cent. per annum, and to be repaid to the said Arthur Champernowne by such sales as might from time to time be made by them: And also re-

citing an agreement, bearing date the 20th day of April, 1812, and made between the said Sir Christopher Hawkins, the said Arthur Champernowne, the said James Townsend, and the said Charles Scott, after reciting, that the said Arthur Champernowne had then lately agreed to become the purchaser of the manor, borough, and lordship of Honiton aforesaid, at the price of 70,000*l.*, and which was to have been completed at Michaelmas then last, and stating the substance of the last recited agreement, it was agreed, that they, the said Sir Christopher Hawkins, Arthur Champernowne, James Townsend, and Charles Scott, should become the purchasers of all the remainder of the said property so agreed to be purchased by the said James Townsend and Charles Scott, in four equal parts, as tenants in common, and not as joint tenants, and that such purchase should take place from Michaelmas then last, in pursuance of the original contract, and that in the event of either party being desirous of selling his part, that the preference should be given to the other proprietors, and in the event of their declining, it should be at the option of such party to dispose thereof as he might think fit: And also reciting, that the sum of 10,000*l.* was paid on the 13th day of February then last, by the said Charles Scott, for and on the account, and with the proper money of the said Arthur Champernowne, in part performance of the said recited contract of the 27th of May, 1811, and the same was duly received by the said Thomas Hammersley, Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank, in part of the said purchase-money for the said manor, hereditaments, and premises; but that the same was not laid out

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in the purchase of Exchequer Bills, in pursuance of the said recited agreement of the 27th of May, 1811, it being agreed by the said Charles Scott and Richard Nowell, that the same should remain in the hands of the said Thomas Hammersley, Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank, in trust, until the said purchase should be completed, and that they should allow interest for the same after the rate of 5*l.* per cent. in case a good title could not be made to the said Arthur Champernowne; and also reciting, that the said Thomas Hammersley had then lately departed this life; and the said Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank constituted the firm of Hammersley and Co.; and that there was more money then due and owing to them from the said Richard Smith, Elijah Brooke, and James Townsend, for money lent and advanced, than the sum of 60,000*l.*, the remainder of the purchase-money for the said manor, hereditaments, and premises: And also reciting, that the said Charles Scott, Arthur Champernowne, Sir Christopher Hawkins, James Townsend, and the said Richard Smith, Elijah Brooke, James Townsend, and John Buller Pearse had severally agreed to relinquish their several and respective rights and interests of, in, and to the several recited agreements: and the said Arthur Champernowne had agreed to become the purchaser of the said manor, hereditaments, and premises, at or for the price or sum of 70,000*l.*, upon the terms and conditions expressed and contained in the said agreement of the 27th day of May 1811, so far as the same had not been complied with: And also reciting, that

the Abstract of Title delivered to the said Charles Scott had been handed over to, and the same was then in the hands of, the said Arthur Champernowne : It was witnessed, declared, and agreed by and between all and every the said parties thereto, that the said several therein recited agreements should be from thenceforth considered null and void, and the same as if they were cancelled by the several parties interested therein : And it was further witnessed, that for and in consideration of the sum of 60,000*l.*, thereafter agreed to be paid by the said Arthur Champernowne to the said Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank (who then constituted the said firm of Hammersleys and Co.), the said Richard Nowell did thereby for himself, his heirs and assigns, by and with the consent and approbation of the said Richard Smith, Elijah Brooke, James Townsend, and John Buller Pearse, and also the said Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank, testified as therein mentioned, promise and agree to and with the said Arthur Champernowne, his heirs and assigns, that the said Richard Nowell, his heirs and assigns, should on or before the 1st day of May then next ensuing, at the proper costs and charges of the said Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank, make out a good title unto and at the charges and expenses of the said Arthur Champernowne, his heirs and assigns, by such conveyances, assurances, &c., as the said Arthur Champernowne, his heirs and assigns, or, &c., advise or require, well and sufficiently convey and assure, &c., by all proper and neces-

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sary parties, unto and to the use of the said Arthur Champernowne, his heirs and assigns, or to such other person or persons as he or they should direct or appoint, all that the borough, lordship, and manor of Honiton, in the county of Devon, with its rights, royalties, members, and appurtenances, and all the messuages, farms, lands, tenements, and other hereditaments, and the several and respective rights, members, and appurtenances to the said borough, lordship, and manor belonging, as set forth and described in the particulars annexed to the said agreement of the 27th day of May, 1811, therein recited (being the printed particulars aforesaid), free from all incumbrances, save and except certain leases granted of part of the said premises for terms of years, and the lives of certain persons, as set forth in the said particulars, and which were then unexpired, existing, and not determined; to hold the said borough, lordship, or manor, messuages, farms, lands, tenements, hereditaments, and premises, with the appurtenances, unto the said Arthur Champernowne, his heirs and assigns, or unto such person or persons, and his or their heirs and assigns, as he the said Arthur Champernowne should direct or appoint, freed and discharged from all incumbrances whatsoever, save and except the land-tax, and except the leases for years and lives chargeable upon and affecting the said borough, manor, hereditaments, and premises: And the said Richard Smith, Elijah Brooke, James Townsend, and John Buller Pearse did thereby for themselves, their heirs, appointees, and assigns, promise and agree to and with the said Arthur Champernowne, his heirs and assigns, that he the said Arthur Champernowne, his heirs and assigns, should be

entitled to the rents and profits of all and singular the said borough, manor, messuages, hereditaments, and premises, from the 1st day of May then next, or from such time as the said purchase should be completed: And it was thereby further witnessed, that for the considerations aforesaid, and in pursuance of the said agreement on the part and behalf of the said Arthur Champernowne, and in consideration of the several agreements thereinbefore contained, and entered into by the said Richard Nowell and the said Richard Smith, Elijah Brooke, James Townsend, and John Buller Pearse, with the said Arthur Champernowne, as aforesaid, he the said Arthur Champernowne did thereby for himself, his heirs and assigns, promise and agree to and with the said Richard Nowell, his heirs and assigns, and the said Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank, their executors, administrators, and assigns, that he the said Arthur Champernowne, his heirs and assigns, should and would, on or before the 1st day of May then next, well and truly pay or cause to be paid to the said Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank, their executors, administrators, and assigns, the sum of 60,000*l.*, being the remainder of the said sum of 70,000*l.*, as and for the absolute purchase of the said borough, lordship, manor, messuages, lands, tenements, and hereditaments therein before mentioned: And the said Arthur Champernowne did thereby for himself, his heirs and assigns, further promise and agree to and with the said Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank, their executors, administrators, and assigns, and also to and

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with the said Richard Smith, Elijah Brooke, James Townsend, and John Buller Pearse, their heirs and assigns, that he the said Arthur Champernowne, his heirs and assigns, should and would well and truly pay or cause to be paid unto the said Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank, their executors, administrators, and assigns, or to the said Richard Nowell, his heirs or assigns, upon the trusts reposed in him and them by the said secondly-mentioned indenture or declaration of trust, of the 29th day of December, 1810 (and therein recited), all and every such sum and sums of money for the *increased value* of the said borough, manor, messuages, hereditaments, and premises, or any part thereof, by or *in consequence of the death or deaths of* any person or persons since the 29th day of September, 1811, for whose life or lives any of the said messuages, lands, tenements, and hereditaments were theretofore granted: And lastly, it was thereby agreed and declared, by and between the said Richard Smith, Elijah Brooke, James Townsend, and John Buller Pearse, their heirs, appointees, and assigns, and the said Arthur Champernowne, his heirs and assigns, that such increased value should be ascertained by one indifferent person, if they should agree in the nomination of such person; if not, by two indifferent persons, one to be chosen by the said Richard Smith, Elijah Brooke, James Townsend, and John Buller Pearse, their heirs and assigns, and the other by the said Arthur Champernowne, his heirs and assigns; and in case such two persons should not agree in their valuations of such increased value, then they should name an umpire: And it

was thereby agreed and declared, that the award or decision of the person or persons so to be chosen and nominated as aforesaid should be conclusive. Provided always, and it was thereby declared and agreed by and between the said Richard Smith, Elijah Brooke, James Townsend, John Buller Pearse, Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank, and the said Arthur Champernowne, that the said Richard Smith, Elijah Brooke, James Townsend, and John Buller Pearse should receive from or be allowed interest by the said Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank, upon the sum of 7,000*l.*, part of the said sum of 10,000*l.*, at the rate of 5*l.* for 100*l.* by the year, from the 13th day of February then last to the time of the completion of the said purchase; and that the said Arthur Champernowne should in like manner receive from or be allowed interest by the said Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank, upon 3,000*l.*, residue of the said sum of 10,000*l.*, at the same rate and for the same period; but in case a good title could not be made to the said borough, manor, lands, and hereditaments thereby agreed to be conveyed and assured as aforesaid, then they the said Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank, should and would pay or cause to be paid, unto the said Arthur Champernowne, his executors, administrators, and assigns, the said sum of 10,000*l.*, with lawful interest for the same, from the said 13th day of January then last, until it should be ascertained and settled that a good title could not

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be made out to the said borough, manor, lands, and tenements.

Richard Smith died on the 22d of August, 1814, having by will, duly executed, (after various bequests, legacies, &c. not affecting the property in question,) given and bequeathed the residue of his personal estate whatsoever, &c. to Mary Townsend, her executors, administrators, and assigns, to and for her and their own use and benefit absolutely, and appointed Mary Townsend, his daughter, sole executrix.

John Buller Pearse died on the 18th of October, 1814, having by his will devised all his part, property, and share of the said borough, manor, and lordship, and all other hereditaments in Honiton, unto George Brooke and James Townsend, in trust, to carry into effect any contract for sale, or to enter into any new contract with the same or any other persons, and to apply the money in discharge of incumbrances; the surplus, if any, to be paid to his wife: and appointed his wife Sarah Pearse sole executrix, who proved his will.

On the 15th day of March, 1813, Arthur Champernowne paid into the banking-house of Messrs. Hammersley and Company the sum of 15,000*l.* in further part payment of the purchase-money of the said borough and other hereditaments, for which the firm of Messrs. Hammersleys and Company agreed to pay or allow interest at the rate of 5*l. per cent.* upon the completion of the purchase.

The estates were subject to a mortgage for 11,000*l.* and interest to John Beague, Richard Bere, and Henry Dunsford, as residuary legatees and executors named in the last will and testament

of John Dickenson, deceased; and some part of the estate was also subject to a mortgage to William Peard Tillard and Malachi Blake, their executors and administrators, for the term of one thousand years, for securing 2,000*l.* and interest.

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On the 25th day of May, 1816, Richard Nowell received a draft conveyance of the said borough and hereditaments from him, to or in trust for Arthur Champernowne, prepared by Mr. Spedding, the solicitor to Arthur Champernowne, wherein it was recited (amongst other things) that the increased value arising from the deaths of lives had been fixed and ascertained at the sum of 1,454*l.* 7*s.*, to the mutual satisfaction of all persons interested in the account of such value; and the *decreased value, owing to the inaccurate statement of the ages* in a particular of sale therein referred to, had been estimated at the sum of 961*l.* 8*s.* 11*d.*, to the mutual satisfaction of all persons interested in the account of such value; and the said sum of 961*l.* 8*s.* 11*d.* being deducted from the said sum of 1,454*l.* 7*s.*, there remained, as an increased value upon the whole, the sum of 492*l.* 18*s.* 1*d.*, and the said sum of 492*l.* 18*s.* 1*d.* make, together with and in addition to the said sums of 10,000*l.* and 15,000*l.* already paid, and the sum of 45,000*l.* which remained to be paid, the full sum of 70,492*l.* 18*s.* 1*d.* By the same draft conveyance it was also recited, that the mortgage sums of 11,000*l.* and 2000*l.* were to be retained by Arthur Champernowne out of that part of the purchase-money which remained to be paid; and that after such deductions, there remained to be paid by Arthur Champernowne, for the remainder of the purchase-money, the sum of 32,492*l.* 18*s.* 1*d.*

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Richard Nowell returned the draft conveyance to Mr. Spedding, approved of, on the 4th July, 1816, with two trifling alterations; but the same was never executed by Arthur Champernowne, or any of the proposed parties thereto.

The bill prayed that Arthur Champernowne might be decreed specifically to perform the agreement of the 11th day of December, 1812, and to accept a conveyance of the said estate and hereditaments according to the draft so prepared and approved of as before mentioned; and that he might pay to Richard Nowell the sum of 32,492*l.* 18*s.* 1*d.* together with interest thereon from the 4th day of July, 1816; the Plaintiffs being ready and willing to allow interest upon the sums of 3,000*l.* and 15,000*l.* up to the time of payment of the residue of the purchase-money, and also to execute a proper conveyance of the estate and premises to Arthur Champernowne.

Arthur Champernowne, on the 17th of April, 1818, appeared and put in his answer to the bill, and the cause being at issue, a commission was obtained for the examination of witnesses on the part of the complainants. Arthur Champernowne also proceeded to examine witnesses, and obtained divers orders for enlarging publication; but before publication had passed, Arthur Champernowne died, having made and published his last will and testament in writing, bearing date the 19th day of June, 1818, whereby, after devising and bequeathing his estates and effects in the manner therein mentioned, he appointed his wife, Louisa Champernowne, Robert Hurrell Froude, and Anthony Buller, executrix and executors of his will; which on the 16th of December, 1819, was proved

in the proper Ecclesiastical Court by Louisa Champernowne and Robert Hurrell Froude.

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The suit having become abated by the death of Arthur Champernowne, James Townsend and Mary his wife, and Elijah Brooke, George Brooke, Sarah Pearse, Richard Nowell, Hugh Hammersley, Charles Greenwood, John Rose Drewe, and Henry Brooksbank filed their bill of revivor on the 26th day of January, 1820, against Louisa Champernowne and Robert Hurrell Froude, as personal representatives of Arthur Champernowne; and the suit was revived by an order of the Court, on the 3d of February, 1821.

The same Plaintiffs filed their bill of revivor and supplement, on the 10th of February, 1821, against Louisa Champernowne and Robert Hurrell Froude, in their character of trustees and devisees under the will of Arthur Champernowne and against Arthur Champernowne (the younger), the eldest son and heir-at-law of Arthur Champernowne, deceased, and against Henry Champernowne, &c. the younger children of Arthur Champernowne and devisees named in his will, and against Robert Harrington, William Kinsey, and Caroline Kinsey, also devisees named in his will: And by an order of the Court the suit and proceedings were revived accordingly.

The cause was heard on the 24th of February, 1821, when the Court decreed that it should be referred to one of the Masters of the Court to inquire and report to the Court, whether the Complainants in the suit could make a good title to the estates and premises comprised in the contract of the 11th of December, 1812, in the pleadings of the said cause mentioned, according to the



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terms of such contract ; and if the Master should find that the Plaintiffs could make a good title, then he was to inquire and state at what time they were able to make such title, and at what time they first showed to the said Defendant, Arthur Champernowne, deceased, or to his solicitor, that they the said Plaintiffs were able to make such title ; and that the said Master should also inquire and report to the Court, whether the value of the said estate and premises had been diminished by any dilapidations which had taken place since the 11th day of December, 1812, and to what amount such value of the said estate and premises had been thereby diminished, and in what manner, and through whose default, the same had happened ; and that the said Master should also inquire and report to the Court, whether any arrangement, binding upon the representatives of the said Arthur Champernowne, deceased, was come to in his lifetime, with respect to the deductions to be made from the purchase-money on account of the ages of some of the persons for whose lives part of the estates and premises comprised in the said contract had been let, having been inaccurately represented ; and if the said Master should find that any such binding arrangement did take place, then he was to state the particulars thereof ; and if he should find that no such binding arrangement took place, then that he should also inquire and state to the Court what deduction ought to be made from the purchase-money on account of such inaccuracy in the description of the ages of any of the persons for whose lives any part of such estate and premises were let ; and that the said Master should also inquire and report to the

Court, whether any of the persons for whose lives any part of the estates and premises comprised in the said contract were held on the 29th of September 1811, had died since that time, and whether any arrangement binding upon the representatives of the said Defendant, Arthur Champernowne, deceased, was come to in his lifetime, with respect to the payments to be made by the said Defendant, Arthur Champernowne, deceased, on account of the lives which had so dropped, or any of them: And it was further ordered by the Court, that the said Master should also inquire and report how much the value of the said estate and premises had been increased by the deaths of such persons, or of such of them as to which no such binding arrangement should be found to have been made; and the said Master was thereby at liberty to make such separate report or reports to the Court, from time to time, as he should see fit, and all further directions were thereby reserved until the said Master should have made his said report; in the making of which inquiries the usual powers and directions were given.

Elijah Brooke died, having made his will on the 27th of August, 1820, and George Brooke his sole executor proved the will in the Prerogative Court on the 10th of August, 1822.

On the 6th of December, 1821, a commission of bankruptcy was issued against James Townsend and George Brooke, under which they were declared bankrupts; and the usual assignments of their personal estates were executed to Emmanuel Dommett, William Rogers, and Nathaniel Reed, who were chosen assignees by the creditors for that purpose.

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In Trinity term, 1822, James Townsend and the former Plaintiffs with others, who had acquired interest under the will and bankruptcy, filed a bill of revivor and supplement, whereupon the suit was revived.

Mary Townsend died on the 29th of September, 1822, having by her will appointed James Townsend her executor and residuary legatee, who procured letters of administration to be granted to him by the proper Ecclesiastical Court of her estate and effects, with the will annexed; and administration of the estate and effects of Richard Smith, deceased, left unadministered by Mary Townsend, were also granted to James Townsend by the proper Ecclesiastical Court.

The suit and proceedings having become abated by the death of Mary Townsend, James Townsend, with the other Plaintiffs in the former suit, filed their bill of revivor in Hilary term, 1823, and thereupon the suit was revived.

The Master proceeded, in pursuance of the decree, to inquire into the title of the Plaintiffs, and having made a report, on the 16th of August, 1824, against the title, exceptions were taken by the Plaintiffs to such report, which were allowed by the Court; and the Master was directed to review his report generally touching the matters and things referred to him by the decree. The Master thereupon proceeded on the inquiry, and finally reported, on the 29th of March, 1827, in favour of the title, with the exception of a very small portion of the estate. Exceptions were taken by the Defendants to this report, which exceptions were on argument over-ruled. The Plaintiffs also took exceptions to the report, the first of which

was allowed, to the effect following: "that the  
 " Master ought to have found that the Plaintiffs  
 " were able to make such good title previously to  
 " the commencement of the suit;" and this re-  
 port as to title was confirmed by order, dated the  
 11th of July, 1827.

The Master did not proceed on the inquiry directed by the decree as to the increased value of the estate and premises by the deaths of persons holding for lives, until the Court had decided that the Plaintiffs could make a good title.

By his report, bearing date the 7th of April, 1831, after stating that in pursuance of the decree, he found that certain parts of the said estates and premises comprised in the said contract, were held, on the 29th of September, 1811, upon the lives of the several persons in that behalf named in the schedule thereto annexed; and that such persons were then (in the year 1810) of the several ages stated in that behalf in the same schedule, and that some of such persons (which persons were distinguished in the same schedule) had since died at the respective times mentioned in the same schedule; and he found, that the said parts of the said estates and premises which were so held upon the lives of the persons mentioned in the said schedule, were of the several net estimated annual values mentioned in the sixth column of the said schedule; which said net estimated values he had assumed, with the consent of both parties, as the foundation of his calculation, but without prejudice as to the real values thereof, no evidence having been produced before him to show the actual value of the same: And he further certified, that for the purpose of ascertaining how much the

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value of the said estates and premises had been increased by the deaths of the persons before mentioned, he had recourse to the Northampton Table of Mortality, such table being generally in use in the year 1811, when the contract in the said decree mentioned was entered into, assuming 4*l.* per cent. per annum as the rate of interest upon which the calculation for ascertaining such value should be made, such being the usual rate of interest adopted by the Court, where no specific rate is reserved: And he further certified, that, agreeably to such table, and proceeding upon such basis as to the rate of interest, and assuming the value of an estate in fee-simple in possession in each of the said premises to be equal to twenty-five years' purchase of the net annual value, he found how much the value of the reversion was increased by the dropping of the several lives enumerated. He also found that the value of the reversion had been increased by reason of the *increased age of* other lives, and set forth the particulars and amount of increase in respect of the dropping and wearing of the lives. He then annexed a schedule and a statement, which was intitled as follows:—

“The statement referred to by the foregoing Report for the purposes of elucidating the principles upon which the results mentioned in the said Report have been arrived at.”

The body of the statement was then given as follows:—

“It is evident, that when an estate is under lease, that the value of the lease, together with the value of the reversion, form the whole value of the estate, and consequently that the greater the value of the lease the less the value of the reversion, and

*vice versa*. The value of a life lease depends not only upon the number of lives subsisting, *but also upon the respective ages of those lives*, and as the lives drop off or advance in age, the lease decreases in value, and the reversion proportionately increases in value. The Master, in explaining the process of his Declaration, would suppose, in the first instance, the annual rent to be 1*l.*; and on this supposition, at an interest of four per cent., the perpetual annuity or rent of 1*l.* (or the whole value of the estate) would be 25*l.* In case No. 124. there were in 1811 three lives subsisting, at the ages of 43, 44 and 56 respectively, and the present value of an annuity of 1*l.* to be received until the death of the last survivor of those three lives, he should estimate at 15.913*l.* (that is, 15*l.* and  $\frac{913}{1000}$ ths of a pound); and this amount deducted from the 25*l.* would give 9.087*l.* as the value of the reversion at that time. In 1815 there were two of these three lives surviving at the advanced ages of 58 and 60, and the present value of an annuity of 1*l.* to be received until the death of the survivor of those two lives, he estimated at 12.156*l.*, which being deducted from the 25*l.* leaves 12.854*l.* as the value of the reversion at this second period. In 1818 there was but one life remaining at the advanced age of 61, the value of an annuity of 1*l.*, on this life, estimated at 8.795*l.*, being deducted from 25*l.*, leaves 16.205*l.*, as the value of the reversion at this third period; and at the end of 1830, when the same life continued in existence at the further advanced age of 73, the value of an annuity on which life, estimated at 5.507*l.*, being deducted from 25*l.*, leaves 19.493*l.*, as the value of the reversion at the

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end of 1830." He then added particular instances to explain the principles of his calculation.

Exceptions to this report were taken by the Defendants on the 15th April, 1831. By the first exception the Defendants complained that the said Master had, in and by his said last-mentioned report, found that in the month of March, 1815, when the life aged 43, mentioned in the schedule to the said report annexed, with reference to the premises No. 124. therein mentioned, dropped, the value of the reversion of the said premises No. 124. was increased or improved by the dropping of such life, and by reason of the increased ages of the two remaining lives in such schedule in the same month of March, 1815, by the amount of 398*l.* 6*s.* 8½*d.*; whereas the said Defendants thereby insisted that the Master ought to have calculated what was the value of the net rent of 105*l.* 14*s.* 10½*d.*, in such schedule mentioned, for and during the life of the longest liver of Susannah Spurrell, Mary Hodge and Jonathan Hodge, in such Schedule mentioned, at the respective ages of 47, 60 and 58 years, in the month of March 1815; and the value of such net rent for and during the life of the longest liver of Mary Hodge and Jonathan Hodge, at their respective ages of 60 and 58 years in the same month; and to have deducted the latter from the former value, and to have found the difference between the two values so calculated to be the increased value of the premises, No. 124., by or in consequence of the death of Susannah Spurrell, on the 8th of March, 1815.

The next seven exceptions involved the same principle as the first.

The Exceptions were argued before Chief Baron Lord Lyndhurst, on the 5th of May, 1831, when his Lordship expressed an opinion favorable to the report, but thought a difficulty arose in the way of granting the Plaintiffs the relief thereby granted to them, from the wording of the decree of the 24th of February 1821, and ordered the exceptions to stand over, with liberty for the Plaintiffs to present a petition for re-hearing, or such other petition as they might be advised. The Plaintiffs accordingly, on the 9th June, 1831, presented a petition of re-hearing, but the petition not having been, according to the order and practice of the Court, presented within six months after the decree had been pronounced, could not be prosecuted.

The Plaintiffs thereupon, on the 7th of July, 1831, presented a petition, stating, amongst other things, that there was no express inquiry directed by the decree as to how much the value of the estate and premises had been increased since the 29th day of September, 1811, by or in consequence of the wearing of the lives of the persons for whose lives part of the estate and premises were, on the 29th day of September, 1811, holden, and that the greater part of the estate was, on the 29th day of September, 1811, holden by leases for lives at small conventional rents, and many such leases were then continuing; and the value of the reversion of each tenement so held was then very considerably increased, partly by the deaths of persons holding for lives, and partly by the advanced ages or wearing of lives since the 29th day of September, 1811; and that no inquiry was by the decree directed as to the value of the wearing of the lives

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in respect of such parts of the estates where no life had dropped on a tenement, or (as it was objected by the Defendants) for the wearing of lives existing even when a life had dropped ; and that to proceed on the inquiry already directed would be a waste of the Master's time, and occasion a great delay in the final decree on the equities of the Plaintiffs, if the Master were then to proceed on the inquiry already directed, and thereafter to be ordered and directed to inquire into the increase of the value of the reversion by or (as was the stipulation of the contract), in consequence of the death or deaths of any person or persons since the 29th day of September, 1811 : And that the stipulation of the contract also was, that in case of the death of any person holding for life after the 29th of September, 1811, such should be for the vendor's benefit, to be estimated in the usual way ; and the usual way was to take into calculation the increased value by the wearing or increase of the ages of lives ; and that the inquiry into the increased value by the deaths of persons holding for lives was not commenced till the Court had decided that the vendors could make a good title ; and the Court did not pronounce its decision on the title till the 11th day of July, 1827 ; and that the inconvenience and inadequacy of the direction in respect of increased value was not discovered till the Master had made some progress in the inquiry, and the different parties had insisted on their different constructions of the Order in this part of the decree, and contended for different results in that inquiry.

The petition prayed that the Court would order, by way of supplement or addition to the decree,

that the Master should be directed to inquire and report to the Court how much the value of the estate and premises had been increased by the wearing of the lives or increase of the ages of the persons for whose lives any part of the estate or premises were held on the 29th of September, 1811; and that the estimate of the Master, as to the several values by the deaths and by the wearing or increased ages of lives, might be brought down to the date of the Master's report, so that the cause might, on the confirmation of such report, be in a state for a final decree and decision between the parties.

The petition was heard on the 9th of July, 1831, when the Court ordered, That the master should, in addition to the several directions contained in the decree made on the hearing of the cause, inquire and report to the Court how much the value of the estate and premises had been increased by the wearing of the lives or increase of the ages of the persons for whose lives any part or parts of the estate and premises was or were held on the 29th day of September, 1811.

Richard Nowell died on the 20th of October, 1831, having made his will, whereby he appointed Richard Jackson and Robert Jackson, with his wife Rebecca Nowell, his executors and executrix. Richard Jackson and Robert Jackson proved his will in the proper ecclesiastical court.

Richard Nowell not having by his will or otherwise disposed of his legal estate or interest in the estate and premises vested in him by the indenture of the 29th of December, 1810, such parts as consisted of real estate, descended to Alexander Nowell, his elder brother and heir-at-law, and such

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part thereof as consisted of leasehold or chattel interests, became legally vested in Richard Jackson and Robert Jackson, his executors.

Henry Brooksbank ceased to be a partner of the firm of "Hammersleys & Co." on the 13th April, 1829. John Rose Drewe died in the month of August, 1830, and Charles Greenwood died in the month of January, 1832. The persons constituting the firm of "Hammersleys & Company," at the date of the suit, were Hugh Hammersley, George Hammersley, and Joseph Clarke.

By an indenture dated on the 29th of February, 1832, the lands, &c., which by the deeds of the 29th December, 1810, and 15th December, 1825, had been vested in Richard Nowell, in trust, for sale, &c., were by Alexander Nowell, the heir of Richard Nowell, and all parties interested, conveyed to Henry Utrick Coulthurst, to carry into effect the uses, trusts, and purposes created and declared by the two deeds of the 29th December, 1810.

Arthur Champernowne, the son, died before the commencement of the suit, intestate, leaving his brother Henry Champernowne, his heir-at-law, him surviving.

James Townsend also died before the suit, having made his will, and thereof appointed his son, James Smith Townsend, executor, who proved the same in the proper ecclesiastical court; but no person had taken out letters of administration to the estate and effects of Mary Townsend, left unadministered by James Townsend, deceased, or to the estate and effects of Richard Smith, left unadministered by James Townsend and Mary Townsend; and there was no personal representative of Mary Townsend and Richard Smith.

In Easter Term, 1832, the Plaintiffs filed their bill of revivor against the Appellant and the Reverend James Smith Townsend; and by an order made in the cause, on the 11th of July, 1832, it was declared, that the deeds of lease and release and appointment, bearing date respectively the 28th and 29th days of February, 1832, were well proved; and that Henry Utrick Coulthurst was trustee for the purposes therein mentioned, in the place and stead of Richard Nowell, &c.

The appeal was against the order of the 9th June, 1831.

For the Appellant : \*

A plaintiff cannot in equity enforce the performance of a contract different from that which he made. Here the Plaintiffs contracted expressly for the dropping of lives, but not for the wearing, an event foreseen and known. Compensation for the wearing of lives is not made a part of their case by the bill, and the decree follows the case so made and the prayer of the bill, and the very terms of the contract. If the merits were in question, *Blount v. Blount*†, and *Davy v. Barber*‡, would rule the decision. But this appeal will turn upon a rule of settled practice in courts of equity, that a decree cannot be altered in any direct and operative part by petition, but only upon re-hearing, review, or appeal. An issue cannot be altered, without a rehearing. The order in question alters the substance of the decree on petition. There is no other

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\* The case was argued in 1833, by Mr. Pepys for the Appellant, and by Sir Edward Sugden for the Respondent; and in 1835, by Sir W. W. Follett for the Appellant, and Mr. Pemberton for the Respondent.

† 3 Atk. 636.

‡ 2 Atk. 489.

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instance of such an order: authority and practice is uniformly to the contrary. *Brockfield v. Bradley*\*, *Brackenbury v. Brackenbury*.† The order is made upon a matter which might have been the direct subject of the decree. It was omitted, because it was no part of the contract between the parties, and is inconsistent with the decree. Where new facts have been adduced upon a collateral subject, there may have been instances of addition to a decree by order on petition; but this is an alteration of the decree upon a matter directly under the contemplation of the Court, as arising out of the contract, on which the Plaintiff founded his equity. Nor can this be done (as argued) upon further directions: for such directions must be grounded upon the decree to carry the direct matter and substance of it into full execution. If the argument is of any force, there would have been no need of a petition or order upon it. It is asking that to be done which Lord Eldon refused to do, as contrary to the principle of pleading and practice of courts of equity.‡ The principle is clear and the authorities unanswered. The Plaintiffs recognised the practice by acting upon it, for they first presented a petition of rehearing, to cure the defect in the decree, and failing in that, obtained an irregular order upon the petition in question.

The case of *Hitchcock v. Giddins*§ is wholly inapplicable to this case. The rule is stated by Mr. Sugden in his Treatise on Vendors and Purchasers, in the chapter on Interest. There is no hardship in the rule. The parties to the contract knew that

\* 2 Sim. & Stu. 64.

† 2 Jac. & W. 391. See *Crenze v. Hunter*, 2 Ves. jun. 157.

‡ Id. 393. 396. § 4 Price, 135.

the lives would be wearing, and made their contract accordingly. This is a suit asking the Court to give the parties what they have not contracted for. In the *Treatise of Vendors and Purchasers* it is said\*, that in the case of the purchase of reversions, it is now settled that the purchaser, from the time of the report, is entitled to the benefit of the dropping of lives; that the whole incidental benefit belongs to the purchaser; and the only question is, whether the purchaser is to pay interest upon the purchase-money? The rule, as laid down by Lord Hardwicke in *Blount v. Blount*†, is, that interest does not become due upon the wearing of lives; and in the decree in that case it is directed on the dropping of lives, but not in the case of wearing. If the rule is as the Respondents contend, where there is no specific contract on the subject, interest would be payable in all cases, even where no provision is made for it.

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It is argued, that the special provisions of the contract necessarily imply what they ask; but the Plaintiffs by their bill and proceedings, up to this time, have never put upon this contract the construction which they now seek to have applied to it. If the Plaintiffs had been of this opinion when they filed the bill, they would have asked, by alternative prayer, for this specific relief. The pleader must have known that the Plaintiffs could not have this relief on the general prayer, no case having been made for it. It is not true that the Appellants were the authors of the delay. This appears by the report on the exceptions, and the orders. The contract having provided expressly

\* Sugd. V. & P. 4th ed. p. 400.

† *Ante*, p. 263.

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for compensation in one event, it is to be inferred that the usual rule should prevail as to all other contingencies. The decree has proceeded upon this ground, and cannot be altered by order upon petition.

For the Respondents :

Lord Lyndhurst being of opinion that the Master was right in substance, as to his principle of calculation, gave leave to the Plaintiffs to present a petition ; and as their petition for rehearing was excluded by the practice\* of the Court, an order was obtained on a petition for that purpose ; and such orders, in such a case, are not unusual in Chancery. The authorities cited for the Appellant show, that to prevent the setting up an outstanding term, and in some other instances where a case is not made for the relief by the bill, and it does not follow as a necessary consequence, from the statements and prayer of the bill, an order must be obtained by a petition of rehearing ; not so where the relief is collateral and consequential. Now, even before decree, the question upon title may be referred to the Master, on motion on petition, after decree, for it is incidental to the relief prayed. So, in all cases where the additional proceeding is necessary to complete the inquiry. The question in this case depends upon the nature of the tenements, and the broad distinction between present income and prospective value. Here the charge upon the estate would exceed the value, if it is to be taken as at the date of the agreement. The original contract adopted by Champernowne, was in May 1831, and the purchase-money to be paid in the September following. The abstract was to be de-

\* Order in Exch. 1731.

livered in ten days, and if the purchase-money should be paid before or after the time limited, the purchaser was to have the rents and profits from those times respectively. In the meantime, by necessary inference, the rents and profits undoubtedly must belong to the vendor up to the time of payment. The provision as to dropping of lives applies, and is confined to the time after the 29th of September.

*Lord Brougham.* — There are two antecedents.

For the Respondent:

The language is inaccurate, but the provision can only apply to a time limited, and it is clear that both parties contemplated a performance a little before or a little after the 29th of September. The interest upon the purchase money to the extent of the deposit 10,000*l.* was to belong to the vendor, and there is in the agreement of the 11th of December, 1812, a recital highly material, that a balance of more than 60,000*l.*, the residue of the purchase money, was, at the date of the agreement, due from the vendors to Messrs. Hammer-sley and Co., which residue Champernowne by the operative part of the deed agrees to pay to them, and by the adopted agreement the purchaser was to be entitled to the rents and profits only from the completion of the payment. Now the rents and profits rightly estimated consist partly of the nominal or conventional payment in the name of rents and partly of the current value of the incumbent lives.

It is argued that the bill is not formed so as to comprise this relief. The bill was obviously framed with a view to this case, but as the Court thought the decree incomplete, the order in question was

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obtained on petition. The stipulations of the agreement as to the delivery of the abstract, payment of the purchase money, &c., show the contemplation in both parties of prompt performance of the contract. The vendor has been kept twenty years in suspense, by the contrivance of the purchaser, who proposes to be subject only to the chance of the dropping of the lives, although those which remain may not be worth two years' purchase: according to this argument, if the life by wearing is reduced to the value of a day's purchase, no allowance is to be made to the vendor. The bill asked for immediate execution of the contract. This was prevented by delay. The consequence is, that the vendor is thrown back upon the equity of the agreement, and the result of the petition and order is, that he is entitled to relief according to the contract. The equity of the case, the Defendants have by their own conduct acknowledged, for they have themselves claimed and received compensation in respect of lives in which the ages were overstated. Orders such as that in question have frequently been made by way of addition to the decree in cases of dilapidations. The wearing of lives is the profit of the estate, so it is considered in *Davy v. Barber*\*: and how do such profits differ from rent? The subject of purchase being a reversion, the question is, what is the difference in the value of the reversion at the several times of the contract and the performance: this is what the Master found by his report on the order. The report is imperfect, but we did not except, because, as far as it goes, it is in our favour. If the relief sought is not given,

\* 2 Atk. 489.

the Respondent is entitled to interest on the purchase money from the date of the contract to the extent of the value of the wearing of the lives which at 4 per cent would exceed his present claim. He is entitled either to interest as in ordinary contracts, or to the equivalent. If the purchaser has the value of rent in the wearing of lives, the vendor ought to have interest, *Dyer, v. Hargrave*.\* We do not seek to alter the contract, but to put a reasonable construction upon it: if a contract were made without any provision as to the rents and profits a court of equity would administer the relief now prayed. In a case where a lease was set aside after a contract for purchase, the purchaser upon a bill filed, was charged with the additional value, *Hitchcock v. Giddins*.† The principle is the same, whether applied to a lease or the wearing of lives; it is founded on the same fact, the increase of value by an event not directly contemplated. Courts of equity in carrying contracts into execution imply all necessary incidents. Here the common rule as to interest from the nature of the case was not applied. But the valuation of the wearing of lives is incidental to the contract for dropping of lives.

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*Lord Brougham*.—When this appeal was heard before your Lordships on a former occasion, I wished my noble and learned friend on the wool-sack to be present when it should be further argued by one counsel on a side. The difficulty which I felt as to the decision arose from the case of *Blount v. Blount*‡, which appears to have been decided upon the principle of not allowing the

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\* 10 Ves. 505.

† 4 Price, 135.

‡ *Antè*.

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wearing of lives to be taken into account; for Lord Hardwicke there says, that interest shall not be given on the wearing of lives. I am aware of what Mr. Preston very judiciously suggested, that there is a difference between the form of that proceeding and the form of the present bill; there it was not a bill for a specific performance, but an open bidding or sale in the Master's office.

But I have another general objection to the authority of *Blount v. Blount* being decisive of the present case. Upon the question of the merits, I have a strong opinion, from which nothing has moved me that I have heard to-day in favour of the decision of the noble and learned Judge in the Court below upon the present case. We are to consider the difference of the times. In the days of Lord Hardwicke, eighty or a hundred years ago, cases of this sort, involving calculation on reversionary interests, which gave rise to questions in the transaction of pecuniary and other affairs, were of less frequent occurrence, and consequently the subject was less familiar and necessarily less understood than it is now, when, from the great amount of our transactions in the funds, from the great amount of our commercial, and consequently pecuniary transactions, as well as transactions of this sort, the subject has become familiar and well understood. The establishment of friendly societies has brought down to the more humble classes of the community a familiarity with these subjects which even the most learned calculators only now and then considered in the days of Lord Hardwicke. Courts of justice now proceed upon views, and their attention is called to matters, which were then not fully considered or acted upon. It

is clearly equitable, and a pressing equity, not to allow a man to have both the interest of the purchase-money and the profits of the possession of the estate. This purchaser, pending the litigation, and upon the completion of the contract, will have been, in point of profit, in possession during thirteen years before his entry, because the rents were arising for his profit, as though they had been lying in a bag at the banker's, by the wearing out of the lives.

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I have, therefore, no doubt, as at present advised, that the decree is right upon the merits and the substance of the case; at the same time, I am of opinion, that it would be a dangerous precedent, if this house, the Supreme Court, in the last resort, were to disturb a rule so constantly applied and recurring in practice, and to allow the alteration of a decree by order on petition, it being admitted that it cannot be altered upon a motion. It would be, in fact, substituting a proceeding of that summary nature for a rehearing, by authority of the Appellate jurisdiction. I am of opinion, and the noble and learned Lord upon the woolsack is also of opinion, that it would be dangerous to open the door, by the authority of this house, to such a proceeding, and such a precedent would soon be carried farther than even the precedent we should make warranted, for that is the usual consequence of bad precedents.

I have no manner of doubt, from appearances as to what took place at the rehearing, that the attention of the Court was not called properly and effectually to this matter of form, but that the other and much more important point as to the merits, was that to which alone the attention of the

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Court was then called. The unfortunate part of the case is this: it will go back to the Court below; there will be a little more litigation; the parties will waste their time and their money in that litigation; it will then come back to this House, and in the end we shall probably give the judgment which we might be ready to give now, if the case were rightly before us.

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The *Lord Chancellor*.—This appears to be an experiment. A party tries first a petition for rehearing; but being out of time, and having failed in that, he then presents this petition. My attention was not called to the form of proceeding at the time. The petition is irregular, and the judgment must therefore be reversed.

Judgment reversed.

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## IRELAND.

(EXCHEQUER CHAMBER.)

JOHN JACK, Lessee of CUTH- } *Plaintiff in Error;*  
BERT FETHERSTON H. Esq. }

THEOBALD FETHERSTON H. } *Defendant in Error.*  
Esquire . . . }

John Fetherston H. made his will as follows:—I bequeath to my nephew Edward Briscoe, the sum of 1000*l.* sterling; to my nephew Fetherston Briscoe, a like sum of 1000*l.* sterling; to Cuthbert Fetherston, of Ballintopher, the sum of 200*l.* sterling, with remainder to his eldest daughter, in case he shall not live to receive the same: I give, devise, and bequeath to my much respected kinsman William Fetherston, son of Cuthbert Fetherston, of Mosstown, and to his heirs male according to their seniority in age, on their respectively attaining the age of twenty-one years, all my estates real and personal, in lands, houses, and tenements not hereinbefore disposed of, the elder son surviving of the said William Fetherston and the heirs male of his body lawfully begotten always to be preferred to the second or younger son; and in case of the failure of issue male in the said William surviving him, or their dying unmarried and without lawful issue male attaining the age of twenty-one years, then to Theobald Fetherston brother of the said William, and his heirs male lawfully begotten on attaining the age of twenty-one years, the elder to be preferred to the younger; and in case of the death or failure of the issue male of the said Theobald lawfully begotten and their not attaining the age of twenty-one years, then to my right heirs for ever: and I do hereby empower the said Theobald Fetherston, when in possession, to charge and encumber the said estates and properties, as a provision for a younger child or children by him lawfully begotten, with any sum not exceeding 3000*l.* sterling, in such proportions as he shall by deed or will direct; and for want of such direction, or in the event of any of the sons of the said Theobald Fetherston inheriting the said estates or properties, then

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said sum of 3000*l.* to be equally divided between said younger children, be they son or sons, daughter or daughters; and if but one younger child, then the entire said sum of 3000*l.* to such only child, &c. &c.

At the time of the making of the will, on the 26th of April, 1827, William Fetherston was living, and had issue male of his body two sons, Cuthbert Fetherston H., the lessor of the plaintiff, his eldest son, and William Fetherston H., his second son, then living. William Fetherston in the will named, died on the 3rd of May, 1829, leaving Cuthbert Fetherston H. his eldest son and heir-at-law, and William Fetherston H., second and only younger son, and Anne Fetherston H., his only daughter him surviving.

The testator died in June, 1829.

Upon these facts found in a special verdict, Held, that the will gave an estate tail to William, which lapsed by his death. Whereupon an estate tail vested in Theobald the defendant in error.

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**T**HE question in this case arose on the construction of the will of John Fetherston H., of Grangemore, in the county of Westmeath.

Cuthbert Fetherston H., the lessor of the Plaintiff, claimed to be entitled under the said will to the several towns and lands of Churchtown and Dondaniel, with their sub-denominations and appurtenances, situate in the barony of Rathcourath; and also all the lands of Priestown, otherwise Pritchett's Park, situate in the barony of Farbill, in the county of Westmeath.

The Defendant also claimed to be entitled under the will to the said premises for an immediate estate in tail male, in possession.

In order to try the question in dispute between Cuthbert Fetherston H. and the Defendant, an action of ejectment was brought in Hilary term, 1830, against the Defendant, in the Court of King's Bench, in Ireland, to recover possession of

the premises, in which action issue was joined ; and on the 5th of March, 1830, the action was tried at the assizes for the county of Westmeath, before the Right Honourable Charles Kendal Bushe, Chief Justice of his Majesty's Court of King's Bench in Ireland.

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On the trial the jury returned a special verdict, the material facts of which are as follow : —

The jurors found that John Fetherston H., late of Grangemore, in the county of Westmeath, Esquire, before and at the time of making his last will and testament, and the codicil thereto hereinafter mentioned, and at the time of his death was seised, &c. of fee, amongst other things, of and in all that and those the town and lands of Churchtown and Dondaniel, with their several sub-denominations and appurtenances mentioned in the declaration within written, and was also seised in his demesne as of freehold during the natural lives of three persons who are still living and in existence of and in all that and those the lands of Priesttown otherwise Pritchet's Park, mentioned in the said declaration ; and being so seised of the said towns and lands of Churchtown and Dondaniel, with their several sub-denominations and appurtenances, that he the said John Fetherston H. afterwards, to wit, on the 26th day of April, in the year of our Lord 1827, being of sound mind, memory, and understanding, duly made and published his last will and testament, in writing, &c., which said will and testament is as follows, that is to say,

“ I bequeath to my nephew Edward Briscoe,  
 “ the sum of 1000*l.* sterling : to my nephew Fe-  
 “ therston Briscoe, a like sum of 1000*l.* sterling :  
 “ to Cuthbert Fetherston, of Ballintoher, the sum



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“ of 200*l.* sterling, with remainder to his eldest  
“ daughter, in case he shall not survive to receive  
“ same : I give, devise, and bequeath to my much  
“ respected kinsman William Fetherston, son of  
“ Cuthbert Fetherston, of Mosstown, and to his  
“ heirs male according to their seniority in age, on  
“ their respectively attaining the age of twenty-one  
“ years, all my estates real and personal in lands,  
“ houses, and tenements not hereinbefore disposed  
“ of, the elder son surviving of the said William  
“ Fetherston, and the heirs male of his body law-  
“ fully begotten always to be preferred to the se-  
“ cond or younger son ; and in case of the failure  
“ of issue male in the said William surviving him,  
“ or their dying unmarried and without lawful  
“ issue male attaining the age of twenty-one years,  
“ then to Theobald Fetherston, brother of the said  
“ William, and his heirs male lawfully begotten, on  
“ attaining the age of twenty-one years, the elder  
“ to be preferred to the younger ; and in case of  
“ the death or failure of the issue male of the said  
“ Theobald lawfully begotten, and their not attain-  
“ ing the age of twenty-one years, then to my right  
“ heirs for ever : and I do hereby empower the  
“ said Theobald Fetherston, when in possession, to  
“ charge and encumber said estates and properties,  
“ as a provision for a younger child or children by  
“ him lawfully begotten, with any sum not ex-  
“ ceeding 3000*l.* sterling, in such proportions as  
“ he shall by deed or will direct ; and for want of  
“ such direction, or in the event of any of the sons  
“ of the said Theobald Fetherston inheriting the  
“ said estates or properties, then said sum of 3000*l.*  
“ to be equally divided between said younger  
“ children, be they son or sons, daughter or

"daughters; and if but one younger child, then  
 "the entire of said sum of 3000*l.* to such only  
 "child," &c.

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On the 9th of June, 1829, the testator John Fetherston H., being so seised and possessed as aforesaid, made and published a codicil in writing to his will, which codicil bore date on the day and year last aforesaid, and was signed by him, the testator, in the presence of two credible witnesses only, who subscribed their names as witnesses thereof in the presence of the said testator John Fetherston H., which said codicil is as follows:—

"Grangemore, 9th of June, 1829, I do hereby  
 "revoke my former will with respect to the houses  
 "and lands of Grangemore; all these and the furniture belonging to them I now will to my nephew Edward Briscoe, in addition to what he is entitled to by my last will. John Fetherston H.  
 "(Seal.) Witness, James Montgomery, James Adams;" as it doth by the said codicil produced in evidence to the jurors aforesaid appear.

The testator John Fetherston H. died on the 22d of June, 1829, seised of the said towns and lands of Churchtown and Dondaniel, with their several sub-denominations and appurtenances, and of the said lands of Priestown, otherwise Pritchett's Park, without further altering or revoking his will, and without altering or revoking his codicil to his will, and leaving Cuthbert Fetherston H., the eldest son of the devisee William Fetherston, him surviving, and also leaving the Defendant Theobald Fetherston H., the devisee in the will named, to whom a remainder in the lands was thereby limited, him surviving.

The special verdict was afterwards argued before

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the Judges of the Court of King's Bench in Ireland, and on the 9th of February, 1831, the Court gave judgment unanimously in favour of the Defendant, and judgment was accordingly made up on the *postea* of the special verdict in favour of the Defendant.

The Plaintiff afterwards brought a writ of error on this judgment in the Exchequer Chamber in Ireland, and the case was argued at great length in the Exchequer Chamber before the twelve Judges of Ireland; and on the 13th of June, 1832, the Court of Exchequer Chamber gave an unanimous judgment in favour of the Defendant, and thereby affirmed the judgment of the Court of King's Bench.

From these decisions the Plaintiff appealed to the House of Lords.

For the appellant, *Sir John Campbell* and Mr. *Jemmett*.

The question in this case is, whether the estate limited by the will of John Fetherston to William Fetherston and his heirs male, falls within the rule of law in *Shelley's* case. Or whether there is an intention apparent upon the will that William should take an estate for life, only remainder to the first and other sons of William successively as purchasers in tail. If the first part of the will only be referred to, it might appear that William took an estate tail. That is clear, if the word "heirs" be used in the strict technical sense as a word of limitation and not of purchase. It is not like the word "sons," which is a word of purchase; it is not like the word "issue," which is of a flexible nature, and with regard to which there is no presumption one way or another. The presumption

is that the word "heirs" is used as a word of limitation and not of purchase, but in construing a will, courts of justice always look to the sense in which the word is used by the testator. If he puts a meaning on it which is equivalent to "son," then it is to be construed as a word of purchase and not as a word of limitation. Your lordships will endeavour to collect from the whole context of the will in what sense it was used by the testator. The first clause of the will "I give to William and his heirs male, according to seniority, &c.;" if it had stood alone, would clearly have vested an estate tail in William, because there would be nothing to make it an exception to the rule in *Shelley's* case. But the son is *persona designata*; and there are words of limitation added to the limitation in favour of the son, which shew that the son is made the *stirps* from which those who are to take under the estate tail were to be derived. He devises the estate tail to the elder son "surviving" — a very important word in the singular number; and at this time William had a son, Cuthbert, whose existence must have been well known to the testator. The devise is to "the elder son surviving of the said William Fetherston, and the heirs male of his body lawfully begotten" — words of limitation being super-added in the devise to the son. Can there be any reasonable doubt, unless there be some rigid rule of law preventing the intention of the testator being carried into effect, that although there is not an estate for life expressly limited to William the first taker, the intention of the testator was that William should take no larger interest than an estate for life without any power of alien-

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ating the property, and that after his death his eldest surviving son should take an estate by purchase.

The testator has here put a meaning upon the word "heirs;" he has shewn that he used that word in an improper, untechnical sense, and that he has used it for "son." He has told us his meaning was the same as if he had in words given the lands to William, son of Cuthbert Fetherston, for life, and to his sons, the elder son surviving, and the heirs male of his body, to be preferred. The limitation is to the son who shall survive, so that it might be contended that this estate tail would not be vested until the death of William, that it is in effect a contingent remainder.

These words are different from any words to be found in a will, where it has been decided that the first devisee took an estate tail; and they are essentially different from the words giving the remainder over to Theobald, which are "in case of failure of issue male in the said William surviving him, or their dying unmarried, and without lawful issue male, attaining the age of twenty-one years, then to Theobald Fetherston, brother of the said William, and his heirs male lawfully begotten, on attaining the age of twenty-one years." There are no such words here as "the elder son *surviving* Theobald." Admitting that Theobald took an estate tail, there are no words following that would rebut the rule of law that an estate being given to him and his heirs male, it would be an estate tail executed in him. The words in the gift to William "on their respectively attaining the age of twenty-one years," also indicate that the testator used "heirs" as a word equivalent to "sons," and if you are satisfied that the word is so used, you will con-

strue the word in the same sense which the testator has put upon it.

Here is a particular intent that William should take an estate for life only, and that the first and other sons should take successively in tail male by purchase. Nor is there any general intent which requires a different construction to be put upon the words. It has been suggested that the general intent might have been defeated, supposing William's son had had a son, and that son could not take by purchase. That is a difficulty, but it is a remote possibility, and ought to be contrasted with the very near probability of William dying in the lifetime of the testator; because in such event, if it was an estate tail in William, all the issue of William are defeated: they take nothing. It will much more effectually further the intentions of the testator, and make that disposition of his property which he intended, by construing it to be an estate for life in William with successive estates tail by purchase to his first and other sons.

There are cases, in which words not more powerful than those which occur in this will, have been held abundantly sufficient to shew that the word "heirs" has been used as sons, so as to prevent the rule in *Shelley's* case taking effect.

In *Archer's* case \* the limitation was to A. for life, and afterwards to the next heir male, and to the next heirs of the body of such heir male. It was held to be only an estate for life in A., remainder to the heir by purchase, because the heir was shewn to be *persona designata*, as "eldest surviving son" is in this case.

*Lisle v. Gray* †, which turned upon the construc-

\* 1 Rep. 63.

† 2 Levinz, 223.

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tion of a deed was a case of ejectment for lands in Northumberland, and on a special verdict, the case was this:—“One seised of the lands in question covenanted to stand seised to the use of himself for life; the remainder to Edward his first son for life; the remainder to the first son of Edward in tail male; the remainder to the second, third, and fourth sons of Edward in tail male.” Then follow these words—“And so “to every of the heirs male of the body of Edward respectively and successively, and to the “heirs males of their bodies, according to their “seniority of birth, the remainder to the lessor of “the plaintiff for life, the remainder to his first son “in tail male, and to his second, third, and fourth “son in tail male, and so to all and every other, “the heirs male of the body of the lessor of the “plaintiff severally and respectively, according to “their seniority of birth.” The covenantor died; Edward suffered a common recovery and died without issue male; and the question was whether he could bar the remainders by a recovery, whether he took an estate tail in default of the issue of the four sons, or whether he was only tenant for life; and it was held that these words, “and so to all and every other the heirs male of “the body of Edward” should be taken as if it were to all and every the sons of Edward (the same question as arises here). It was argued for the lessor, that Edward took only an estate for life, and that the heirs male were to take by purchase. On the other hand it was argued that the words of the limitation shewed that the ancestor took an estate of freehold with a limitation afterwards to his heirs or the heirs male of his body,

which vested an estate of inheritance in the first taker, for which *Shelley's* case was cited. The court decided that Edward took "only an estate for life by the manifest intent of the conveyance, which ought to be pursued where by any means it can." In effect the judgment was, that the covenantor used the word "heirs" for "sons," and, consequently, that Edward took only an estate for life, and that the sons took an estate tail by purchase.

Here he first uses the word heir and then son, while there he first uses son and then heir male.\*

In *Lawe v. Davies* †, "Daniel Jevau devised part "of his lands to his wife Dame Anne Jevau for "and during her natural life, and from and after "her decease then to his son Benjamin Jevau "and his heirs lawfully to be begotten." (Here the word "heirs" is used first, and if I stop here it is an estate tail;) but then is added, "that is to "say, to his first, second, third, and every son and "sons successively, lawfully to be begotten of the "body of said Benjamin, and the heirs of the "body of such first, second, third and every other "son and sons successively, lawfully issuing as they "shall be in seniority of age and priority of birth, "the eldest always and the heirs of his body to be "preferred before the youngest and the heirs of his "body, and in default of such, &c." In one case it is to William and to his heirs, the elder son surviving,

\* This case, as reported by Levinz, concludes thus: "And "so they gave judgment for the Plaintiff; upon which a writ of "error was brought, and upon the first argument the Court of "Exchequer Chamber inclined to affirm the judgment, but before it was affirmed or reversed, the suit abated, *per mortem*, "and afterward a new ejectment was brought, *sed quid inde venit, nescio*." But it appears (see 1 P. W. 90.) that the judgment was affirmed.

† 2d Lord Raymond, 1561.

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“ and the heirs male of his body lawfully begotten  
 “ always to be preferred to the second or younger  
 “ son,” shewing in the one case and in the other  
 that “ son” and “ heirs,” are used synonymously.

In *Lawe v. Davies* “ it was insisted on,” that  
 “ an express estate tail being given to Benjamin by  
 “ the first words and no express estate for life,”  
 “ the *videlicet* that comes after and the subsequent  
 “ words in the other devises, cannot turn that  
 “ into an estate for life in Benjamin with intails  
 “ to his sons successively, for what follows the  
 “ *videlicet* and the other devises to the sons is  
 “ contrary to the express devise to Benjamin, *sed*  
 “ *non allocatur* ; for *per curiam* the whole will must  
 “ be took together, and one part explained by the  
 “ other ; and the intent was most manifest, that  
 “ the devisor in all the devises of the lands in  
 “ question designed to give Benjamin only an  
 “ estate for life and not in tail, and the *videlicet*,  
 “ and the other clauses, were not contrary but  
 “ explanatory of what heirs of the body of Ben-  
 “ jamin the devisor meant. And judgment was  
 “ given for the Plaintiff November 18th, 1729, by  
 “ the unanimous opinion of all the Judges.” And  
 there was no writ of error brought. The reasoning  
 of the court in that case applies strongly to the  
 present. Every argument in that case might be  
 used against the construction for which the Re-  
 spondents contend in this case, and among others,  
 against that argument of the elder son dying  
 leaving a son ; to provide for which event, it might  
 be said that if the intent of the testator were to be  
 carried into effect, it would be necessary to find an  
 estate tail in the first taker, and thereby to defeat  
 the general intent. But the argument failed in that

case as it would in this ; since the Court is merely to consider how the words are intended to be used, and to carry the intent into effect.

*Doe v. Laming* \* was a case of a devise of gavelkind lands in these words, to A. and "the heirs of his body lawfully to be begotten:" then there follow these words, shewing that the testator did not use heirs in the proper technical sense, "as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike." Gavelkind lands would not descend to the females: this breaks the descent, and shewed that the preceding words could not be used in the strict technical sense; and therefore it was held that the words "heirs of the body" did not operate as words of limitation, or create an estate tail in A. This is another exception to the technical construction of the word "heirs," &c. arising from the context.

Again, in *Goodtitle v. Herring* † this doctrine is fully recognised. There was "a devise to A. for her natural life, without impeachment of waste: remainder to trustees to preserve contingent remainders, remainder to the heirs male of the body of A. to be begotten severally successively, and in remainder one after another according to seniority." Here are words which would give a technical estate tail — but then follow these words, "the elder of such sons and the heirs male of his body being always preferred before the younger of such sons, and the heirs male of their bodies, and in default of such issue, to the daughter and

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\* 3 T. R. 135. note; 2 Burrow, 1100.

† 1 East, 264.

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"daughters of the body of A. as tenants in common  
"in tail," remainder over. Here it was held that A.  
took only an estate for life, and that the words  
"heirs male of her body" were explained by the  
subsequent words to mean first and other sons.

Lord Kenyon in construing this will, lays down the rule of law peculiarly applicable to this case: he says, "I have not the smallest doubt upon this case. The intention is most obvious to give the first taker only an estate for life; but if that intention could not be carried into effect without shaking a positive rule of law, I should certainly bow to the decisions." The case of *Colson v. Colson* went on that ground, and so afterwards did *Perryn v. Blake* in the Exchequer Chamber, where the Judges thought that after the rule of law in *Shelley's* case had governed so many subsequent decisions, however imperfect in itself, as a rule for construing the intention of the testator, it was necessary to abide by it. That rule, however, is only established to the extent in which it is to be found in *Shelley's* case, to this effect, that if an estate of freehold be given to a man, and either mediately or immediately in any part of the same instrument, an estate is limited to the heirs of his body, the latter limitation will unite with the former, and give him an estate tail, but it never has been decided that those words might not be otherwise explained in the will by the testator himself. They were so explained in *Lawe v. Davies*. There the question was whether the words "heirs lawfully to be begotten" could not be explained by the subsequent words to mean heirs of a certain description; in other words, whether the testator could not say "by heirs lawfully to be

“begotten, I mean the first and other sons successively,” &c. of the first taker. Of this there could be no doubt. In former times, indeed, greater strictness was attributed to the meaning of the words “heirs of the body.” The estate which was the subject of dispute in the case of *Lawe v. Davies* came afterwards to a gentleman who was not perfectly satisfied with the decision, and would have it canvassed again. His doubts were founded upon an old opinion which he had discovered of Lord Holt’s, that the words “heirs of the body” were so positively to give an estate tail to the first taker, that they could not be gotten rid of by subsequent words. That opinion I have seen, but it was certainly too straight-laced a construction; and nobody has ever since doubted but that the case of *Lawe v. Davies* was rightly decided. That case, however, if it wanted confirmation has been fortified by the subsequent decision in *Doe v. Laming*” (of which his Lordship read a note of Mr. Fulmer’s, taken, as he said, more accurately than that by Sir James Burrow). “The Court there clearly thought that the subsequent words ‘as well females as males’ shewed that the testator meant the words ‘heirs of the body,’ &c. to be words of description of the persons whom he intended should take, and not words of limitation. I well remember the case of *Jones v. Morgan*. There were no words of limitation superadded to the devise to the heirs male, which has always been holden to be of great weight in cases of this sort.

“It is unnecessary to go through all the other cases. *Bagshaw v. Spencer* establishes the same principle. *Lisle v. Gray* is stronger still, because

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“ it was a construction on a deed. All conspire to shew that Margaret Davis took only an estate for life, and not in tail.”

There is an Irish authority, where the words are not “ heirs ” or “ heirs of body,” but “ issue ; ” but the reasoning upon that case is very material : it is the case of *Mandeville v. Lackey* \*, decided before the Irish House of Lords. There was a special verdict finding these facts : —

“ James Butler being seised in fee of one undivided third part of the premises, mentioned in the declaration, on the 3d of November, 1781, duly made his last will, by which *inter alia* he devised all his worldly substance, of what kind and nature soever, &c., whether real or personal, as follows : — I give, leave, and bequeath unto my nephew, Edmond Mandeville, of Callan, in the county of Kilkenny, gentleman, during his life only, subject, &c., and after the determination of that estate, to the said Edmond Mandeville’s *lawful issue male, and the lawful issue male of such heirs.*” (He first uses the words issue and then heirs ; and there can be no doubt that that would be quite enough to create an estate tail in Edmond,) “ the eldest always of such sons of the said Edmond Mandeville to be always preferred before the youngest, according to their seniority in age and priority of birth ; and for want of such lawful issue in the said Edmond Mandeville, to the Right Honourable Lord Carrick, and his issue male,” subject to certain charges therein mentioned, with a remainder, from and after the determination of the said estates, to the use of the Right Honourable

\* 3 Ridgeway’s Cases, p. 352.

“ John Scott, Esquire ; and after his decease to  
 “ the use of his lawful issue male, the eldest  
 “ always taking place of the youngest,” &c.

James Butler, the testator, died on the 20th of November, 1781, unmarried, and without issue, when Edmond Mandeville entered into and became seised of one undivided third part of the said towns, lands, and premises ; and being so seised, in Hilary term, 1788, 28 G. S., levied a fine, and suffered a recovery of the said premises. On the 7th of May, 1790, Edmond Mandeville died, leaving no issue born, but leaving the Defendant, his wife, *enceinte* of a daughter, who was afterwards born ; to wit, Mary Frances, who was then living, and was the heiress-at-law of Edmond Mandeville. On the 28th of November, 1790, the Earl of Carrick entered a claim upon the fine ; and on the 28th of December following, he made an effectual entry upon the premises, in the declaration, to avoid the operation of the fine. The special verdict then found lease, entry, and ouster, and concluded in the usual form. The question to be determined in that case was whether Edward Mandeville took an estate for life or in tail under the will of James Butler : and the words were the same as in this case, “ and for want of such  
 “ lawful issue,” &c., with a limitation over. The question was argued, that the word “ issue ” in a will has the same import and effect with the words “ heirs of the body,” and is more properly a word of limitation than of purchase ; it is a plural word, and as comprehensive as the words “ heirs of the  
 “ body,” which have always been admitted to be words of limitation : but it was decided unani-

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mously in the Court of King's Bench, that Edmond took only an estate for life, not an estate tail to his first and other sons by purchase.

A writ of error was brought in the House of Lords, and Lord Chief Baron Yelverton delivered the opinion of the Judges in favour of the judgment below. Lord Chancellor Clare said, "The judgment in this case does not in any measure shake the authority of any one of the cases which have been cited at the bar. The general rule is clearly settled, that where an estate is given by deed or by will to a man for his life, with remainder to the heirs of his body, or to his issue, without saying more, an estate tail vests in the ancestor, and the heirs of his body or his issue will take it by limitation. The rule never was questioned that I know of, except in the case of *Perrin v. Blake*; and the judgment of the Court of King's Bench in that case was reversed in the Exchequer Chamber. So far, therefore, as the case of *Perrin v. Blake* goes, I consider it to be an authority further confirming this rule. It was originally founded in the principles of the feudal law, to prevent conveyances in fraud of the tenure;" (that is a very disputed point, what was the origin of the principle of the rule in *Shelley's Case*). "But this rule of interpretation prevails only where the limitation is such as I have stated, unaccompanied by words of explanation. If the testator will explain what he means by "heirs of the body" or "issue male;" if there be a clear designation of the persons whom he means to give the estate to as purchasers, there the rule has always been relaxed, and the intention of the testator has been effectuated." I can hardly conceive words more clearly designating the person than those which the testator in this will uses, when

he says, "the elder son surviving of the said William Fetherston, and the heirs male of his body lawfully begotten, always to be preferred to the second or younger son." The truth is, as Lord Eldon said in the case of *Jesson v. Wright*, by sacrificing the particular intent to the general intent you defeat both, because you allow the first taker to obtain a complete dominion over the property; he takes an estate tail, and by that the intention of the testator is defeated.

In the case of *Poole v. Poole* there are certainly words which look very much like those in the will of John Fetherston, but it was not upon those words that the Court of Common Pleas gave their opinion, but upon what in the civil law is denominated the specialty of the case. There were limitations pretty much resembling those contained in this will, but Lord Alvanley cautiously abstains from giving an opinion what the decision would be if the words on which the Respondent relies were used in that case. In *Poole v. Poole* the testator devised all his real estates to the use of trustees (it was equitable estate, but the Court of Common Pleas did that which Mr. Justice Bayley has refused to do; namely, put a construction upon the words as if legal estates were taken,) and their heirs, that they should receive the rents and profits of his estate for the use and benefit of his first son by Lucy his wife begotten, or to be begotten, during his life, and also upon trust to preserve the contingent remainders from being defeated or destroyed, and after his decease in trust for the several heirs male of such first son lawfully issuing so as the elder of such sons and the heirs male of his body,

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should always be preferred and taken before the younger, and the heirs male of his body, and for want of such issue in trust, for his second, &c. The testator then charged the estates with certain provisions and devised them, "to his nephew Thomas Poole then residing in the East Indies, for life; then to trustees to preserve contingent remainders; then to his nephew Anderton Poole for life; then to trustees to preserve contingent remainders; and after the death of Anderton Poole, to the first and every other son and sons of the body of Anderton Poole, lawfully to be begotten successively as they shall be in priority of birth, and seniority of age, and the several heirs of their respective bodies lawfully issuing so as the elder of such son, and the heirs of his body shall always be preferred and take before the younger of the same sons and the heirs of his and their bodies."

The question was, whether the eldest son of the testator took an estate for life or in tail; or in other words whether the testator had not explained himself by the words, "heirs male of the body" in that devise, to say "sons," by declaring "that the elder of such sons and the heirs of his body should always be preferred and taken before the younger." If the will had stopped there, the case might have been in point; but even if it had been upon those words Lord Alvanley had given his judgment, I would still have distinguished that case from the present, for here we have "the elder son *surviving* of the said William Fetherston." There are no such words in *Poole v. Poole*. The words in John Fetherston's will are much more powerful to designate the person. On referring

to *Poole v. Poole* you will find that it is not on words such as are to be found in this will that the opinion of Lord Alvanley proceeded; and he cautiously abstained from giving any opinion what ought to be the just construction of those words. He says\*, "The difficulty arises upon the use of the words in the first limitation 'so as the elder of such 'sons and the heirs male of his body shall always 'be preferred,' &c. only one son having been previously mentioned. It is contended that, according to the rule which has prevailed in cases of this kind, it must be holden that the testator meant to restrain the general sense of the words 'heirs male,' and not employ them as words of limitation." I will not give any opinion whether, if this clause had stood alone unexplained by other parts of the will, such might not have been the proper construction. On that point the Court wish to avoid any determination. Indeed if this had been a single limitation to a stranger, the construction would have depended much upon the liberality with which the judges might be disposed to consider it. But it appears to me that in construing limitations of this sort the courts have never deviated from the general rule, which gives an estate tail to the first taker, where the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary, that no one could misunderstand it. In this case, however, when the limitation upon which the difficulty arises is connected with the other limitations in which he has used the same words,

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\* Bosanquet and Puller's Reports, p. 626.

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clearly without intending that the heirs of the body should take by purchase, it would be strange to suppose he intended the heirs in this limitation to take as purchasers. He afterwards most cautiously says, "I desire it may be observed that we rely on the words used throughout the will, whether the testator was giving to his sons, his daughters, or his nephews, and it will then be seen whether, consistently with the cases, we could put that construction upon the words in the first limitation, which the Defendant contends for." Now if that limitation had stood by itself, there is every reason to believe that Lord Alvanley and the Court of Common Pleas would have found that these words, "so as the elder of such sons and the heirs male of his body shall always be preferred and taken before the younger and the heirs male of his body," would have been sufficient to explain that which goes before, and to show that the testator by heirs meant sons, and that the first and other sons might take successively in tail male.

In the case of *Jesson v. Wright*\*, the question was upon words essentially different from those to be found in this will. There the words were, "And from and after his decease, I give and devise all the said dwelling-houses or tenements, hereditaments and premises, with their appurtenances, unto the heirs of the body of the said William, son of my said sister Anne Wright, lawfully issuing in such shares and proportions as he, the said William, in and by any deed or writing, deeds or writings, or in and by his last will and testament in writing, to be by him duly

\* *Anti*, Vol. II. O. S., p. 1.

“executed in the presence of three or more  
 “credible witnesses, shall give, direct, limit, or ap-  
 “point the same; and for want of such gift, di-  
 “rection, limitation, or appointment, then to the  
 “heirs of the body of said William, son of my said  
 “sister Anne Wright, lawfully issuing.” That  
 case turned upon the effect of the subsequent words.  
 Stopping there it could not be doubted that an  
 estate tail was given; but then follow these words:  
 “share and share alike as tenants in common,  
 “and if but one child, the whole to such only  
 “child; and for want of such issue, I give and  
 “devise, &c. to my right heirs for ever.” The  
 Court of King’s Bench, following the decision of  
*Doe v. Goff*, held those words, “share and share  
 “alike as tenants in common, and if but one child  
 “the whole to such only child,” were sufficient to  
 shew the clear intention of the testator that  
 William should only take an estate for life, with  
 remainder to his first and other sons in tail by pur-  
 chase. When that case came to be argued here,  
 your Lordships disapproved of that decision, and  
 overturned the case of *Doe v. Goff*. Lord Eldon  
 concluded by saying, “It must now be considered  
 “that *Doe v. Goff* is no longer law;” but the  
 words of the will in those cases do not at all re-  
 semble the words in the present will.

In the case of *Jesson v. Wright*, it was deter-  
 mined that the words “share and share alike” &c.,  
 were not sufficient to take the case out of the rule  
 in *Shelley’s Case*; but the general doctrine that a  
 testator may shew by words in the will the sense  
 in which he uses the words “heirs,” or “heirs  
 “male,” or “heirs of the body,” is not impugned  
 by the judgment in *Jesson v. Wright*; nor is it said

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that those words may not be made synonymous with "son" or "sons;" and wherever that is the case such a construction is to be put on the will as it would receive if "son" or "sons" alone had been used.

For the Respondent, the *Attorney-General* and the *Solicitor-General*.

The question is, whether, upon the face of the will, there be enough to enable your Lordships to say clearly that the testator intended William should take an estate for life, and that his first or other sons should, after him, take as purchasers. The codicil not being properly attested, cannot be admitted, as evidence, to have any effect as a declaration, and if properly attested, would be immaterial.

Many of the cases cited, and still more of the cases to be found in the books, were cases of an estate given expressly for life, and where the party was supposed to take an estate tail by a technical rule of law, and not cases where an express estate tail was given, as here to William Fetherston and his heirs male. Where you find a testator gives, in words, an estate for life, but by legal operation an estate tail, there you might be inclined to cut down the estate tail by implication, the consequence of the rule of law, on less clear expressions than you might require where it is manifest the party gave an estate tail. My Lords, I am quite aware there are many cases where Judges have said, that they had little doubt what was the intention of the testator, but that they did not find language sufficiently strong to enable a court of law to carry that intention into effect. In *Driver v. Frank*, Lord Ellenborough, in a boldness of decision for which perhaps there are not many examples in this depart-

ment of the law, said, he was at a loss to conceive how any person could find language in a will sufficiently strong to lead to a distinct perception of the intention of the testator, and yet that the language should not also be sufficiently strong to carry the intention into legal effect. But that sort of difficulty does not arise here; for, in the state of things as they now exist, there is no argument to bear out the proposition that the testator would have preferred the elder brother to the younger, or the eldest brother's child to the younger brother's child. The very contrary appears upon the face of the will; for if you look at a further provision in the will with respect to the children of Theobald, it is manifest that Theobald and Theobald's children were objects of greater concern and care and anxiety than the children of the elder brother William. The will says, "I do hereby empower the said Theobald Fetherston, when in possession, to charge and encumber the said estates and properties, as a provision for a younger child or children by him lawfully begotten, with any sum not exceeding 3000*l.* sterling, in such portions as he should by deed or will direct; and for want of such direction, or in the event of any of the sons of said Theobald Fetherston inheriting the said estates or properties, then, the said sum of 3000*l.* to be equally divided between said younger children, be they son or sons, daughter or daughters; and if but one younger child, then the entire of said sum of 3000*l.* to such only child." Does not that sufficiently indicate that, with respect to Theobald and his family, the testator felt a greater affection for the elder brother, to whom he meant to give an estate of inheritance;

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being dead, he meant Theobald to take it. Although the elder brother had two sons, he thought fit to take no notice of either of them in his will; but he notices the family of the younger brother, and made a provision for them to the extent of 3000*l*. If it was intended by the testator to give to the elder brother an estate for life, and then, by some language equivalent to a *designatio personæ*, to give it, after his death, first to the eldest in tail male, then to the second, why did he not name them? The Appellant was then alive; why was he not named? Why was not the second son named? That would have removed all difficulty. Neither of them are mentioned, but the language used is precisely the same in effect as that which is used in the devise to Theobald, which, as the Appellant concedes, is an estate tail, and not an estate for life. Compare the devise to William with the devise to Theobald, and see whether there is no expression which would vary the estate taken, or the meaning of the testator, or produce any difference with respect to the one or the other. The devise to Theobald is this: "And in case of the failure of "issue male in the said William surviving him, "or their dying unmarried, and without lawful "issue, without attaining the age of twenty-one "years, then to Theobald Fetherston, brother of "the said William, and his heirs male lawfully "begotten, on attaining the age of twenty-one "years, the elder to be preferred to the younger; "and in case of the death or failure of the issue "male of the said Theobald, lawfully begotten, "and their not attaining the age of twenty-one "years, then to my right heirs for ever." Now, with the exception of the word "surviving" which

is to be found in the former devise to William, the two limitations are precisely the same, and the word "surviving" is what the law would import into the limitation to Theobald. The elder "surviving" of course is to be preferred to the younger, for if the elder were dead he could not be preferred to the younger. The word "surviving" therefore in the one case would have no operation, nor the leaving it out in the other case; and comparing the two devises together, word by word, effect by effect, it is impossible to give to Theobald an estate tail without also giving the same estate to William; and if there are words which will give an estate tail, that estate can only be cut down to an estate for life, by words which are just as clear as those which give the estate tail. Comparing the manner in which the estate is given, first to William and then to Theobald, word by word, no material, and hardly a verbal difference can be found. The clause in the devise to William, "the elder son surviving," &c. introduces this difficulty, that if the eldest son had married and died before twenty-one, leaving a son, as it is clear he would take an estate tail under the will, dying before it came to him, he could not have taken at all, nor his issue after him, but the second son must have taken. Now did the testator in that event intend to pass by the first brother and let the estate go to the second? Is it not clear that he intended to prefer the elder to the younger? What estate did he mean to give them? Did he mean William should have an estate only for life, and then that the eldest son should have an estate tail, so that his issue would not take if he died before attaining twenty-one years; or did he mean to give to the elder brother William an

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estate tail, giving to him, out of respect for him, an estate of inheritance, and then giving to the second brother, Theobald, also an estate of inheritance, and leaving it to him nearly in the same words, that in the event, which has occurred, if William did not survive him, so as to take that devise which was intended for him and his heirs, that then it should go to Theobald, as the Court below unanimously have decided? He has spoken of Theobald's children and family in terms of greater affection; and although the sons of William were in existence at the time when the will was made, he does not condescend to name either of them; which would have been much the easier way of designating the persons who were to take after the death of his much respected kinsman, to whom he is supposed to have given only an estate for life. This view of the case, does not rest the title of the Respondents to the judgment of the House upon any technical rule of law, putting the question thus: that there is no difference substantially between the two devises. If one is conceded to be an estate tail, why then is not the other? Is it cut down by any words that remove all doubt? It is quite manifest the intention was that the first taker should have an estate tail even though in the event that has actually occurred the testator might have said he meant the estate to go to the sons of William after him, in the event of his dying during the life of the testator; but that conclusion is one to which you can come with no degree of certainty, and looking at the whole will, the fair inference and conclusion, from the language used with respect to the younger brother and the terms in which he

and his family are spoken of, is this, that though generally because William was the elder he was inclined to prefer him and his family, yet that was a personal preference for William only, and if the event had occurred, and if his attention had been called to the event of William's death, as occurring during his lifetime, he would have given the property as an estate tail to Theobald the younger brother.

The cases cited for the Appellant clearly shew this: that wherever you can be quite certain that the words used in a will were intended for a designation of the person, and not as limiting the course of descent, that there you may, in aid of the intention of the testator, give to the first taker an estate for life, and to the next person an estate in remainder by purchase. Let us see whether there is any one of the cases thus cited which has the smallest tendency whatever to throw a light on the case which is at your Lordships' bar. As to *Archer's Case* where it was. "To A. for life, with remainder "to the next heir male of A." That was held to be an estate for life and to the heir by purchase; but the word "heir" occurred there in the singular number, and there is an entire chapter in the learned work of Mr. Fearne on contingent remainders, expressly for the purpose of pointing out the distinction between the case, where the word "heir" occurs in the singular number and where it occurs in the plural; but in that case it is quite clear that what was intended to be given was an estate for life. There can be no doubt about it, for the testator himself expressly devises an estate for life, and therefore all the Court would have to do, would be to get rid of the technical rule which enlarges

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that estate for life, in consequence of the subsequent limitation of the inheritance which constitutes an estate tail in the devisee for life. In *Lisle v. Gray*, which arose upon a deed, the question was whether E. took an estate tail or only an estate for life, under the limitations of the deed. This case also falls within the class of those where the first devisee takes an estate for life, and it must therefore be presumed to have been the intention of the testator that he should take an estate only for life, provided that were consistent with the other limitations of the deed. "The Court held the words, " 'and so,' &c. to be words of relation, and gave " judgment for the plaintiff; upon which a writ of " error was brought in the Exchequer Chamber, " where it seems the judgment was affirmed, as is " observed by Judge Tracey \*, who it appears had " searched the record, the reports differing in that " matter." In that case by the words of the deed, the first devisee took only an estate for life, and the sons afterwards in succession took estates tail. But in this case the devise is to " William Fetherston, and " to his heirs male according to their seniority in " age;" a mode of speaking which does not convert the word "heirs" into words of purchase, since they have no other effect than the law itself would give without those words. The case of *Lowe v. Davies* was "a devise to B. and his heirs, lawfully to be " begotten, that is to say to his first, second, third, " and every son and sons successively, lawfully to " be begotten of the body of the said B. and the heirs " of the body of such first, second, third, and every " other son and sons successively, lawfully issuing as " they should be, in seniority of age and prior-

\* 1st Peere Williams.

"ity of birth, the eldest always, and the heirs of his body to be preferred before the younger, and the heirs of his body," remainder over. It was adjudged that B. took but an estate for life, for that the subsequent clause was not contrary to the preceding general limitation to B.'s heirs." It is the same as if he had said "to B. and his heirs," by which I mean the first son, the second son, the third son, explaining what he meant by heirs; and when you have that explanation it is the same thing as if you had the explanation instead of the words; and you might then strike out the word "heirs," and then it would be "to B. his first, second, third, and every son and sons." Now it is quite plain that would not be anything more than an estate for life, and the testator himself, therefore, having explained what he meant by the word "heirs," no court would be at liberty to put any other construction upon it. As to *Doe v. Laming*, it furnishes no argument whatever on the subject. That was the case of a devise to the heirs male and to the heirs female, to be divided equally; and unless the Court should say that the heirs female took nothing, it was quite plain that they must take as purchasers; and if they took as purchasers, it would be impossible to say in that sentence the heirs female could take as purchasers, and the heirs male could take by descent. So in the case of *Goodtitle v. Herring*, the expression "eldest of such sons" particularly pointed out who the sons were, and that the eldest of them was to take, which would enable the eldest to take of course as a purchaser, and not by limitation. I do not mean to say that there is any case to be found where the precise language that has been used in this will has

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been held to give an estate tail, and not an estate for life; but in the case of *Jesson v. Wright*, it is quite plain that Lord Redesdale, who was giving judgment, had a similar case in his mind when he moved to affirm the judgment. He says \*, “ The “ Defendants in error interpret ‘ heirs of the body’ “ to mean children only, and then they say, the “ limitation over is in default of children: but I “ see no ground to restrict the words ‘ heirs of the “ ‘ body’ to mean children in this will. I think it “ is necessary, before I conclude, to advert to the “ case of *Doe v. Goff*. It seems to be at variance “ with preceding cases. In several cases cited in “ the argument it had been clearly established, that “ a devise to A. for life, with a subsequent limit- “ ation to the heirs of his body, created an estate “ in tail, and that subsequent words such as those “ contained in this will had no operation to prevent “ the devisee taking an estate tail. In *Doe v. Goff* “ there were no subsequent words, except the pro- “ vision in case such issue should die under twenty- “ one, introducing the gift over. This seems to “ me so far from amounting to a declaration that “ he did not mean heirs of the body in the tech- “ nical sense of the words that I think they pecu- “ liarly show that he did so mean: they would “ otherwise be wholly insensible. If they did not “ take an estate tail, it was perfectly immaterial “ whether they died before or after twenty-one. “ They seem to indicate the testator’s conception “ that at twenty-one the children would have the “ power of alienation. It is impossible to decide “ this case without holding that *Doe v. Goff* is not “ law.” From this reasoning, I should infer that

\* *Antè*, Vol. II. O. S., p. 57.

the noble and learned person who delivered that opinion would not have thought the use of the words "William Fetherston and his heirs male according to seniority," would break in upon an estate tail; nor would the expression "on their respectively attaining the age of twenty-one;" for if he did not survive he could not take, and if he did survive he would take as elder without the expression.

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*Poole v. Poole* \* was a case sent from the Court of Chancery, in which the Chief Justice gave a very elaborate judgment. So that we are not merely in possession of the ultimate judgment of the Court, but the reasons on which it is founded. You will find several parts are highly worthy of attention. Lord Alvanley says this †: "But it appears to me that in construing limitations of this sort, the Courts have never deviated from the general rule, which gives an estate tail to the first taker where the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." Applying that doctrine to the present case, can any one say that the testator intended to give to the first taker here, William, an estate for life only? The question comes round again to this, what was it that the testator meant? Did he mean to give an estate for life to William, and did he mean to give an estate tail to his sons who were then in existence and whom he has not named? Did he mean to give an estate for life to William, to whom he gives the estate and to his heirs male, following it by limit-

\* 3 Bos. &amp; Pul.

† P. 267.

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ations and provisions, as the words about "seniority of age" which, if he had omitted the law would have provided for? As to the expression "on respectively attaining the age of twenty-one years," which occurs also in the devise to Theobald. What is the meaning of it? Neither party can make much of that provision. I think it may be conceded that it does not advance the argument one way or the other. It neither shows that William took an estate for life, nor that he took an estate tail; it is a question merely as to the appropriation of the rents and profits. As to the words "the elder son surviving of the said William Fetherston and the heirs male of his body lawfully begotten always to be preferred to the second or younger son," that is just what the law would have effected without the expression. In truth, therefore, the testator has given an estate to William and the heirs male of his body, somewhat expanding by superfluous words in his devise that which the law would have done with respect to an estate tail; namely, preferring the elder to the younger, and not allowing the younger to take while any heirs male of the body of the eldest son remained in existence. In conclusion, I beg to draw your attention to the comparison of the devise to Theobald and the devise to William. There is nothing in the one that is not substantially in the other. Each of them contains a preference of the elder to the younger; each of them contains an allusion to the attaining the age of twenty-one years; each of them contains in substance the question of survivorship, because clearly if a party does not survive he cannot take; and then you have a concession (because it could not be denied) that Theobald takes an estate tail.

Is there any thing here in any one expression, or any part of an expression, in any words used, which comes within the rule laid down by Lord Alvanley in *Poole v. Poole*? Is there not language in the devise to William which clearly and necessarily would give him an estate tail? Is there any thing in the language which follows that is "so plain to the contrary that no one can misunderstand it?" Whether you look to the mere meaning of the will, calling in the aid of the most ordinary construction of the words, the most popular construction, and asking what was the intention of the testator; looking to the language that is used, or looking to any of the cases where an attempt has been made on the part of Courts to give effect to an intention which they thought or conjectured might exist in the will, but which there was not language to carry into effect; looking either to principle, to the construction, or to the plain meaning of this testator, can there be any doubt that it was intended to give to William an estate tail, and not an estate for life only? If so, the judgment of the Court below must be affirmed.

In reply, it was said, as to the argument grounded upon the power given to Theobald to portion his children by charging the lands devised, that it rather furnished an inference that he meant to give to Theobald only an estate for life: for if an estate tail the power was superfluous.

There is no express devise of an estate to the sons; but the implication from the words "the eldest son surviving to be preferred," &c. is equally effectual.

*Lord Brougham.*—This is a case which may be considered in one respect to be of some novelty, there being no case expressly deciding or ruling

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this, or which may be considered to be entirely the same. It is seldom, indeed, that you can find an authority precisely and clearly applying to a particular case; and there is some little difficulty arising from those words which postpone the enjoyment. Upon the whole, therefore, it may be better upon those two grounds that your Lordships should give the learned Judges, (though they may not require it,) time to consider their opinion.

I should propose to your Lordships, first setting forth the whole of the will, to put this question to the Judges, — whether under that will the party in question, William Fetherston, took an estate for life as a purchaser, or by words of limitation an estate tail? I do not think it necessary that any other question should be put to the Judges; because if they are of opinion that an estate tail was taken, the judgment below must stand; if that an estate for life was taken, then it must be reversed. If the learned Judges think it advisable that any other questions should be proposed to them, I have no objection to move those questions; but it appears to me that the one I have stated will dispose of the whole matter in issue.

The unanimous opinion of the Judges was delivered by *Tindal*, C. J. of the C. P., as follows:—

The question proposed by your Lordships for the consideration of his Majesty's Judges is this,— Whether, under the devise contained in the will set forth in the special verdict in this case, the devisee, William Fetherston, took an estate in tail, or an estate for life only? And upon this question, the Judges who heard the argument at your Lordships' bar are unanimously of opinion that William Fetherston took an estate in tail.

The words which first occur in the devise, "I give to my kinsman William Fetherston and his heirs male my real estates," do, in a will, give to the devisee a clear and unequivocal estate tail. The only question therefore is, whether the words which follow do with equal clearness and certainty cut down the estate tail so given to the devisee into an estate for life, and make his sons to take estates tail as purchasers, instead of by limitation.

For we consider the rule laid down by Lord Alvanley in the case of *Poole v. Poole*, 3 Bos. & Pull. 627., to be that which ought to govern in cases of this description, viz. "that the first taker shall be held to have an estate tail where the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." This rule appears to be the true result of the former cases, and to have been adopted by Lord Eldon and Lord Redesdale in their judgment in your Lordships' house upon the case of *Doe d. Jesson v. Wright*, 2 Bligh P. C. 1.

Now, applying that rule of limitation to the present case, we do by no means think the subsequent words of the devise show a plain and unequivocal intention to reduce the estate tail to an estate for life; on the contrary, we think them rather more compatible with an explanation, though somewhat incorrect, of the notion which the testator entertained of the course of descent under a gift in tail.

If William Fetherston inherits in tail, his heirs male would take according to their seniority in age: again, the elder son surviving, and the heirs male

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of his body, would be preferred to the second or younger son; and again, the clause which follows before the estate is given over to Theobald, is not inconsistent with a general failure of issue male in William, that is, with an estate tail in William. The words which are interposed, "on their respectively attaining twenty-one years," cannot be brought forward as an argument against the estate in William being an estate tail; for any difficulty created by these words occurs equally whether the estate tail is in William or his sons; and it is admitted that there is an estate tail either in the first taker, or in his first and other sons. Indeed, if the devise is in other respects sufficient to create an estate tail, the deviser cannot, by the introduction of such, or any other words, create a new mode of descent, but the estate will still be an estate in tail.

If the words heirs male are to be construed sons, as contended for by the plaintiff in error, this difficulty would arise, that there is no direct devise in tail to the sons, but an estate tail by implication only; so that the construction would be to abandon a direct devise in tail to William, in order to let in a devise of an estate tail by implication to his first and other sons. Again, if the sons of William take estates tail necessarily as purchasers, it is far from clear that the sons could take more than contingent remainders in tail, viz. on the contingency of each son surviving his father William; and it is very difficult to suppose that the testator could intend to postpone the whole of the issue of the eldest son to that of the second.

Without, however, arguing that a distinct explanation can be given of the words used by the testator, we found our opinion that William took an

estate tail, upon the legal ground that it has been once clearly given to him, and not with any degree of certainty taken away.

*Lord Brougham.*—Agreeing entirely with the opinion of the learned Judges in this case, it is perhaps hardly necessary for me to state the reasons upon which I have arrived with them at the conclusion that the words of this devise give an estate tail, and not an estate for life, to W. Fetherston, the first taker. But as the practice has of late been adopted of assigning the reasons of judgments in your Lordships' House, upon questions touching materially the principles of law which are brought by appeal or writ of error from other parts of the United Kingdom, I conceive it will be advisable that I should not deviate from that course in this instance, where the writ of error is brought from Ireland.

I take the principle of construction, as consonant to reason and as settled by authority, to be this, that where, by plain words in themselves liable to no doubt, an estate tail is given, you are not to allow such estate to be altered and cut down to a life estate, unless there are other words which plainly show the testator to have used the former as words of purchase, contrary to their natural and ordinary sense, or unless there be in the rest of the provisions some plain indication of an intent inconsistent with an estate tail being given by the words in question, and which intent can only be fulfilled by sacrificing the particular provision, and regarding the expressions as words of purchase. Thus, if there is a gift to A. and the heirs of his body, and then, in continuation, the testator, referring to what he had said, plainly tells us that he used the

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words "heirs of the body" to denote A.'s first and other sons, clearly the first taker only took a life estate, and the words were purchase, and not limitation. It is needless to add, that there are a variety of ways in which such a reference and explanation may be given. He may, as in one case, after speaking of "heirs of the body," or "heirs male," which in a will are equivalent to the former expression, proceed, referring to what he had before said, and speak of "*such* first and other sons;" or, as in another case, he may specify "my sons successively *as aforesaid*," or "*as above mentioned*;" or he may say "from and after the death of those several sons who are to take one after another;" or again he may say, as in a fourth case, "the heirs male of A., that is to say, "his heirs and sons successively."

So, if a limitation is made afterwards, and is clearly the main object of the will, which never can take effect, unless an estate for life be given instead of an estate tail,—here again the first words become qualified, bending to the plain intent, and are no longer regarded as words of limitation, which, if standing by themselves, they would have been.

There have been at different times decisions on this point, some of which, as *Doe v. Goff*, are now virtually displaced, and others, as *Doe v. Wright*, are directly overruled by reversal in this House\*. Even *Doe v. Laming*, where the circumstance relied on was the tenancy in common given, has been considerably shaken by its remarkable inconsistency with the purport of some other cases; and as far as regards the peculiar circumstance adverted to

\* See *Jesson v. Wright*, 2 Bligh, O. S. 1.

by Lord Mansfield, of the land being gavel land, it has been expressly displaced by the late case of *Doe v. Harvey*, 4 B. & C. 616. All we need, therefore, say upon this second head of exception to the expressions being taken as words of limitation is, that the general frame of the will *may* render it necessary to consider those words as words of purchase, as well as the explanation subsequently given expressly by the testator, that he used them in this sense. Indeed, such is the force of these words, such their clear tendency to give an estate tail, that we might almost lay it down as a rule, that no other provision of a will is sufficiently strong to defeat this tendency and make them words of purchase, which does not fall within the first head of exception, and show that the testator's meaning was other than it at first sight appears to be.

We are therefore now to examine whether any explanation is, in the present case, given by the testator, which shows that he intended that W. Featherston should only take as a purchaser.

It is first of all quite clear that a gift to W. Featherston and his heirs male is in a will an estate tail; and the addition of "according to their seniority in age" makes no kind of difference, for it is implied in "heirs male," and by no means converts that into "sons."

This was explicitly decided in *Jones v. Morgan*, 1 B. C. C., where the words were, "severally, respectively, and in remainder, the one after the other, as they and every of them shall be in "seniority of age and priority of birth." The qualification of attaining twenty-one years of age, though it may give rise to some difficulties as to

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the administration of the estate, is not in my opinion of a nature to alter the preceding words, or make them words of limitation. Indeed the difficulty which they interpose appears to press nearly as much on the one contention as on the other. But then follow the words on which reliance is mainly placed by the plaintiff in error, "the *elder son surviving* of W. F. and the heirs male of his body always to be preferred to the "second or younger sons," and it is contended that this, by explaining what "heirs male of W. "Fetherston" meant in the preceding part of the gift, converted those into words of purchase.

I am very clearly of opinion that the clause has no such effect; and after remarking that it is connected with the former part by not a single word of reference, I shall advert to the cases which are said to bear out the construction of the Plaintiff in error.

Of *Archer's Case*, 1 Rep., it is unnecessary to say much. There the gift was to A. for life, and to the *next heir male* of his body, and the heirs male of the body of such *next heir male*; and this was held to be purchase in the next heir male, both because, if he were to take by limitation, you must reject the limitation in tail upon that limitation; and also because you must reject *next*, a very important word preceding *heir male*, and one which shows a different intention in the one part of the devise from that prevailing in the other. That case therefore clearly does not bear upon this.

Then *Lisle v. Gray*, in 2 Lev. 223., is relied upon. The limitation was to the first son of A. and the heirs male of his body, and for default of *such* issue to the second *son*, and then to the third

and fourth *sons*, all by the name of *sons*, and the heirs male of their bodies; then come these words, "*and so on to all and every other the heirs male of the body of A. respectively and successively, and the heirs male of their body.*" The ground of this decision was that the connecting words "*and so on*" clearly showed the sense in which the words "heirs male" that follow were used, the testator having thus connected these with "*sons,*" repeated four times over. Surely that case cannot be likened to the present, where, without any word of reference, all we have is, "the "*elder son* surviving to take before the younger." It may, however, be added that *Lisle v. Gray* never was finally decided, for the cause dropped during the pendency of a writ of error, and the reporter expresses some doubt how it might have ultimately gone.

As for *Lawe v. Davies*, 2 Ld. Raymond, it really proves less than nothing. There it was a devise to A. and his heirs lawfully to be begotten; *that is to say*, his first, second, third, and every other son and sons successively to be gotten of the body of A., and the heirs of the body of such first, second, and third sons. Can we doubt that the word "heirs" first used was explained by what followed, the explanatory words being "*that is to say, first and other sons?*" No words can be conceived more clearly explanatory of the sense in which *heirs of A.* had been previously employed. A. then clearly took only an estate for life, notwithstanding the inaccurate use of the word "heirs;" an inaccuracy hardly committed before it is corrected by employing the most technical form of words of purchase.

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As for *Poole v. Poole*, 3 B. & P., it is a case clearly with the Defendant in error. The devise was to A.'s first son for life; remainder to trustees to preserve contingent remainders; remainder to the heirs male of such son, the elder of *such sons* and the heir male of his body always taking before the younger and his heir male; remainder to the second, third, and fourth sons; remainder to the heirs male of the body of the eldest of such sons. Here the word *such* clearly shows sons to mean heirs male, and was held so to do, and not to show the converse, that heirs male meant sons; and Lord Alvanley says, "Words are always to be taken in their ordinary sense, unless the testator has *demonstrated* an intention to put a different sense upon them. Now the words employed in the first devise are clearly, in their ordinary sense, words of limitation." All that follows is to the same purpose; and his Lordship concludes his elaborate and luminous judgment by saying that "the Court would not be justified in suffering the rule of law to be broken in upon, where they cannot see a plain intention to vary the construction which the law puts upon the words heirs of the body."

*Goodtitle v. Harvey*, 1 East, 264., was the case of distinct explanation and plain reference; for it was a devise to heirs male of the body of A. successively, the eldest of *such sons* and the heirs male of his body being always preferred to the younger son or sons. This then was exactly the same with *Lowe v. Davies*, on which I have already remarked.

It therefore appears to me quite manifest that none of these cases gives any warrant for holding

the words added in this case to the gift of an estate tail as sufficient to cut that down to an estate for life, and I have no doubt at all that the earlier words of limitation are to be taken as such, and as standing unaffected by those which follow. Wherefore I have no hesitation in moving your Lordships that the judgment be affirmed, and with costs.

Judgment affirmed.

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## ENGLAND.

(COURT OF EXCHEQUER.)

JOHN L. FOURNIER, since deceased,  
 by original bill; STEPHEN TUR-  
 NER and MARY FOURNIER, by  
 original bill and bill of revivor;  
 and STEPHEN TURNER and MARY  
 FOURNIER, by original bill, bill of  
 revivor, and bill of supplement - } *Plaintiffs;*

THOMAS PAINE, since deceased, and  
 EMMA DICKINSON; ELIZABETH  
 PAINE, since deceased, and the  
 said EMMA DICKINSON, also since  
 deceased; and WILLIAM HENRY  
 DICKINSON - - - - } *Defendants.*

In a suit by mortgagee against the mortgagor, and a party claiming a charge by prior mortgage, as extending over the same premises, a reference was made to the Master to inquire as to the extent and priorities of the securities claimed by the Plaintiff and Defendant respectively. The Master found that P. the mortgagor was seised of a piece of ground, called Lydes, on which a pile of buildings, called Somerset Place, had been erected by him, and that D. had advanced money to enable him to erect the same: that D. from time to time had advanced further sums to P., and that by agreement in 1807, P. charged two of the Houses then built, and two others of the same pile then building, with the amount of monies then owing by P. to D.: that upon an account taken in June 1808, and a memorandum signed at the foot of the account, a similar charge was made upon the premises, for a balance of 2025*l.* then due to D.: that by a memorandum at the foot of an account made up to September 1808, P. charged the premises and likewise all and every other the messuages, lands, hereditaments, fee-farm, or

ground-rents in Somerset Place aforesaid, adjoining the unfinished houses, with the payment of 2425*l.*, and he thereby agreed to execute to D. a mortgage of all the messuages, lands, hereditaments, fee-farm or ground rents situate in Somerset Place: that the messuages mentioned in the memorandum were erected on the piece of ground called Lydes, which comprised not only the site of the buildings called Somerset Place, but a lawn in front thereof, and the site of a messuage, afterwards built, called the Ivy House: that before September 1808 P. collected the water from the upper part of the close called Lydes, and brought it into a reservoir at the lower end of the lawn, which he laid out as an ornament to the buildings called Somerset Place: that the whole of the premises had in 1786 been conveyed in trust for P., subject to a fee-farm rent, and had afterwards been conveyed to and vested in mortgagees to secure 1825*l.*, which D. advanced money to discharge; and the premises in 1812 were reconveyed in trust for P.: that in order to secure the repayment of that sum, together with the other monies advanced by D., the title deeds relating to the premises had been deposited with her agents: that an account of monies due from P. to D. was made up in 1813, and by a memorandum, signed at the foot of the account, P. agreed to charge the four messuages, &c. called Somerset Place, and all other messuages, &c. in Somerset Place, adjoining the four messuages, &c. with payment to D. of 7768*l.*, and he agreed to execute a mortgage of all his messuages, &c. in Somerset Place including the four messuages, &c.

The Master then found that an agreement had been made by P. with persons who were building houses contiguous to Somerset Place to supply these houses with water from the springs and reservoir on the Lydes, in consideration of certain annual rents to be paid to P., which agreement was carried into effect. The Master then found that in consideration of monies advanced and to be advanced by F. to P., he, in 1815, agreed to convey to F. by way of mortgage a piece of ground near to Somerset House, and the messuage then building thereon, called the Ivy House, and also the water rents reserved by the agreements before stated, which agreements had been deposited by P. in the hands of F. for such purpose. He further found that the Ivy House had been built on part of the ground called Lydes, and that the springs which supplied the water, in respect of which the rents had been reserved arose from part of the said land; but he found that the se-

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curity of D. extended over the whole premises, and was the prior security. Exceptions were taken to this report, and, upon argument, were allowed by the Court below — but the order allowing the exceptions was reversed upon appeal.

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**JOHN LEWIS FOURNIER**, in Trinity Term, 1820, filed a bill in Chancery, against **Thomas Paine** and **Emma Dickinson**. The bill set forth an indenture, made and executed on the 31st of August, 1815, between the said **Thomas Paine** of the one part, and the said **John Lewis Fournier** of the other part, reciting that the said **John Lewis Fournier** had, at various times, lent and advanced to the said **Thomas Paine** certain sums of money, making in the whole 700*l.*; and that the said **John Lewis Fournier** had engaged to lend him the further sum of 300*l.* in addition to the monies already advanced; and also reciting that the said **John Lewis Fournier** had not as yet received any security for the monies so advanced, and therefore had applied to the said **Thomas Paine** for that purpose, who had proposed to give him his bond for the said sum of 700*l.*, and to enter into the covenant, therein-after mentioned, for granting and executing to the said **John Lewis Fournier** a mortgage in fee, or for a term of years, of a messuage or tenement which the said **Thomas Paine** was then building upon a certain plot of ground situate near Somerset House, in the parish of Walcot, with the rights, members, and appurtenances, and to assign to the said **John Lewis Fournier**, by way of mortgage, or by way of further or collateral security, the beneficial interest of him the said **Thomas Paine** of and in the agreements of the 28th and 29th days of June, 1810, therein referred to, whereby certain water-rents were se-

cured to the said Thomas Payne, and which said contracts it was agreed should, with the indenture now in statement, in the meantime be deposited in the hands of the said John Lewis Fournier; and also reciting that the said Thomas Paine, in part performance of his said proposal, had, by his bond or obligation in writing, bearing even date with the indenture now in statement, become bound into the said John Lewis Fournier, his executors, administrators, and assigns, in the penal sum of 1400*l.*, with a condition thereunder written for making the same void on payment by the said Thomas Paine, his heirs, executors, or administrators, to the said John Lewis Fournier, his executors, administrators, or assigns, of the sum of 700*l.*, with lawful interest for the same, on the 1st day of March then next ensuing. It was witnessed that in performance of the said proposal, and in consideration of the sum of 700*l.* and so advanced, and of the further sum of 300*l.* intended to be advanced to the said Thomas Paine by the said John Lewis Fournier, he, the said Thomas Paine, did thereby, for himself, his heirs, executors, and administrators, covenant, declare, and agree with the said John Lewis Fournier, his heirs, executors, administrators, and assigns, in manner following (that is to say), that he the said Thomas Paine, his heirs, executors, and administrators, should, on or before the 1st day of March, 1816, sign, seal, and deliver a good and sufficient indenture or instrument, by way of mortgage, to be settled and approved of by the solicitor or counsel of the said John Lewis Fournier, or of his executors, administrators, or assigns, for the purpose of securing to him, and to them, the said sum of 700*l.* with lawful interest for

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the same, to be calculated from the day of the date of the indenture now in statement, together with the sum of 300*l.* intended to be advanced, to or for the benefit of the said Thomas Paine, as aforesaid, with lawful interest thereon, and all other monies which, at the time of the execution of such indenture or instrument, by way of mortgage, should have been advanced by the said John Lewis Fournier to the said Thomas Paine, or for his benefit, together with lawful interest upon all such last-mentioned monies; and the said Thomas Paine did thereby further covenant and agree to and with the said John Lewis Fournier, that he the said Thomas Paine, his heirs, executors, and administrators, would, in and by such indenture or instrument, by way of mortgage, convey, release, assign, or otherwise assure, to the said John Lewis Fournier, his heirs, executors, administrators, appointees, or assigns, all that plot, piece, or parcel of ground, situate, lying, and being near or opposite to Somerset House, in the occupation of the said Thomas Paine, and the messuage or tenement then building, and intended to be built thereon, with their and every of their rights, members, and appurtenances, and also the water-rents reserved in and by the said agreements or contracts, thereinbefore severally referred to, together with the said contracts, and all deeds, muniments of title, and papers relating to the said premises respectively.

Thomas Paine executed a bond to John Lewis Fournier, to the effect recited in the indenture, and bearing even date therewith; and the two several contracts, or agreements, of the 28th and 29th days of June, 1810, were on the 31st of August, 1815, deposited by Thomas Paine in the hands of John

Lewis Fournier. After the execution of the indenture, John Lewis Fournier advanced to Thomas Paine the sum of 330*l.* 6*s.* 11*d.* making the total sum due to John Lewis Fournier 1033*l.* 6*s.* 11*d.* principal money, with interest thereon.

The bill prayed, that an account might be taken of what was due to John Lewis Fournier, for principal and interest, and that Thomas Paine might be decreed to pay to John Lewis Fournier such sum as should be found due on taking such account, or, in default thereof, that the premises might be conveyed and assigned to John Lewis Fournier.

Emma Dickinson appeared and put in her answer to the bill, claiming under a prior mortgage under the circumstances set forth in the Master's report hereafter stated.

Thomas Paine died in October, 1820, having appeared, but without having put in his answer to the bill. By his will he appointed his wife, Elizabeth Paine, his executrix and residuary devisee of his real estate, who proved the will in the proper ecclesiastical court, and the suit was revived against her.

By an order, bearing date the 4th of August, 1821, it was ordered, that it should be referred to one of the Masters of the Court to appoint a proper person to be receiver of the rents of the house and premises, situate near Somerset Place, and also of the water-rents in the pleadings mentioned, with the usual directions; and it was ordered, that the Master should inquire and state to the Court the extent and priorities of the securities held by John Lewis Fournier and Emma Dickinson.

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J. L. Fournier died in January, 1822, and the suit was revived by his representatives in Michaelmas Term, 1822, Stephen Turner and Mary Fournier.

William Henry Dickinson, the defendant to the third suit, having acquired an interest in the premises, subsequently to the institution and revivals of the two former suits, the appellants, Stephen Turner and Mary Fournier, in Michaelmas Term, 1822, filed a supplemental bill, against William Henry Dickinson, who put in his answer to the bill, and the defect in the suits was thereupon supplied.

In pursuance of the order of the 4th of August, 1821, the Master made his report, bearing date the 20th of July, 1824, and thereby, among other things, certified that, previous to the month of November, 1805, Thomas Paine was seised of a piece of ground situate in the parish of Walcot, in the county of Somerset, on which he intended to build certain dwelling-houses, and on which piece of ground a pile of buildings, called Somerset Place, had been since erected, and that such piece of ground was called by the name of the Lydes, or the Great Lydes; and that in the month of November, 1805, Emma Dickenson advanced to Thomas Paine the sum of 200*l.*, to enable him to proceed in erecting the buildings that had been commenced by him on the said piece of ground; and that to secure the repayment thereof, Thomas Paine executed and delivered to Emma Dickenson his bond, in writing, bearing date the 2d of November, 1805, in the penal sum of 400*l.* conditioned to be void on payment to Emma Dickenson, her executors, administrators, or assigns, of the sum of 200*l.* with interest thereon at five per cent. per

annum; that Emma Dickenson continued to advance money to Thomas Paine, and that on the 2d of November, 1807, on the settlement of accounts between them, a balance of 635*l.* 8*s.* 3½*d.* was found to be due from Thomas Paine to Emma Dickenson, and at the foot of the account so settled, a memorandum was written, and was signed by Thomas Paine and the defendant Emma Dickenson, and that such memorandum was in the words and figures following; that is to say, “1807, “November 2d, the above account was adjusted “and settled between us the undersigned Thomas “Paine and Emma Dickenson, and the above balance of 635*l.* 8*s.* 3½*d.* was the balance ascertained to be due from the said Thomas Paine to “the said Emma Dickenson; and the said Thomas “Paine did thereby charge and subject the two “messuages or dwelling-houses lately erected and “built, but not finished, and also the two messuages “or dwelling-houses adjoining, now erecting and “building, with their appurtenances, and respectively situate and lying in the parish of Walcot, “in the county of Somerset, and near the city of “Bath, with the payment to the said Emma Dickenson, her executors, administrators, or assigns, “of the said balance or sum of 635*l.* 8*s.* 3½*d.* as “well as with the sum of 200*l.* advanced and lent “to him by the said Emma Dickenson, on his bond “or obligation, bearing date the 2d of November, “1805, making together the aggregate sum of “835*l.* 8*s.* 3½*d.*, with lawful interest hereafter respectively to grow due thereon, as witness our “hands, Thomas Paine, Emma Dickenson.”

The Master then found, that the two dwelling-houses described in the memorandum as being

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lately erected, but not finished, and the two messuages or dwelling-houses therein described as adjoining those erecting and building, with their appurtenances, were known by the numbers 17, 18, 19, 20; that Emma Dickenson continued to make further advances of money to Thomas Paine; and another account of what was due from Thomas Paine to Emma Dickenson was stated and settled on the 24th of June, 1808, and a balance of 2025*l.* 2*s.* 0*¾d.* was then ascertained to be due; that by a memorandum at the foot of the account, a similar charge was made upon the premises as in the former memorandum; that an account of the dealings and transactions between Emma Dickenson and Thomas Paine, from the settlement of the last account up to the 14th of September, 1808, was stated and adjusted between her and Thomas Paine, and the sum of 2425*l.* 0*s.* 0*¾d.* was thereby ascertained to be the balance then due to Emma Dickenson from Thomas Paine, who signed a memorandum in writing at the foot of the account, bearing date the 14th of September, 1808, whereby he acknowledged the account to be correct, and he thereby charged the premises mentioned in the said last-mentioned memorandum of the 24th of June, 1808, and likewise all and every other the messuages or dwelling-houses, lands, hereditaments, fee-farm or ground-rents, also situate and lying in Somerset Place aforesaid, adjoining the said before-mentioned unfinished messuages or dwelling-houses, with the payment to Emma Dickenson, her heirs, executors, administrators, and assigns, of the sum of 2425*l.* 0*s.* 0*¾d.*; and he thereby agreed to make and execute unto Emma Dickenson a good and sufficient mortgage of all and every the messuages

or dwelling-houses, lands, hereditaments, fee farm or ground-rents, situate and lying in Somerset Place aforesaid, including therein the four unfinished messuages or dwelling-houses.

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The Master certified that the dwelling-houses mentioned in the memorandum of agreement of the 2d of November, 1807, and in the memorandum of agreement of the 24th of June, 1808, were erected on the said piece of ground, which, previous to there being any erections or buildings thereon, was known by the name of Lydes, or Great Lydes, and that the said lands had been purchased in the years 1784 and 1786, by Thomas Paine, from John Hooper, and that the land, formerly called Lydes, or Great Lydes, comprised not only the site of the buildings now called Somerset Place, but a lawn in the front thereof, and the site of a messuage or dwelling-house which had been since erected at the south corner thereof, and called the House of Protection, or Ivy House: that, previous to the 14th day of September, 1808, Thomas Paine collected the water from the upper part of the close called Lydes, or Great Lydes, and brought the same into a reservoir at the lower end of the said lawn, and laid out the said lawn for an ornament to the buildings called Somerset Place, and he certified that from the affidavit of John Slade, of Devizes, in the county of Wilts, gentleman, sworn the 12th of June, 1823, and from inspection of the several indentures therein mentioned, that the ground then forming the lawn before the buildings called Somerset Buildings, and on which the house called the House of Protection, or Ivy House, containing one acre and a half, and called the Lydes, or Great Lydes,

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was granted by the said John Hooper to John Fielder, in trust for the said Thomas Paine, by indentures of lease and release, bearing date respectively the 23d and 24th days of September, 1784, subject to a fee farm rent of 12*l.* 12*s.* payable thereout; and that another close or piece of land adjoining, and containing three and a half acres, called Lydes, or Great Lydes, and now, with the buildings thereon, called Somerset Place, was conveyed by the said John Hooper to the said John Fielder, in trust for the said Thomas Paine, by indentures of lease and release, bearing date the 14th and 15th days of July, 1786, subject to a yearly fee-farm rent of 25*l.* payable thereout.

The Master then stated, that the whole of the premises, comprised in the said several indentures, by mesne conveyances became vested for an estate of inheritance in Messrs. Foster, and Co. to secure a sum of 1825*l.*; and that by indentures of lease and release of the 23d and 24th days of October, 1812, the said Messrs. Foster, and Co. in consideration of 1825*l.* granted and conveyed the said two several plots or pieces of ground and the messuages or dwelling-houses thereon erected, unto the said John Fielder, and his heirs and assigns, in trust for the said Thomas Paine, his heirs and assigns: And the Master further certified, that the sum of 1825*l.* was advanced by Emma Dickenson to the said Thomas Paine, to enable him to pay off the said mortgage; and that for securing to Emma Dickenson the sum of 1825*l.* with other large monies which she had previously advanced to Thomas Paine, and on the occasion in the report, stated, the title deeds relating to the said premises were deposited and left with John Slade, for the purpose of effecting the security therein

mentioned, and still remained in his custody, or the custody of his agents; and the Master further found, that an account of the dealings and transactions between Emma Dickenson and Thomas Paine, was stated and settled up to the 14th day of September, 1813, and that the sum of 7768*l.* 6*s.* 4*½d.* was then found to be due from Thomas Paine to Emma Dickenson, and that a memorandum was written at the foot of the account bearing date September 10, 1813, and signed by Emma Dickenson and Thomas Paine; that Thomas Paine thereby charged the four messuages, or dwelling-houses, lately built by him, and their respective appurtenances, in a certain place, or site of buildings, called Somerset Place, in the parish of Walcot, and likewise all and every other messuages or dwelling-houses, lands, hereditaments, and fee-farm or ground-rents, also situate, lying, and being in Somerset Place, adjoining the aforesaid four new erected messuages or dwelling-houses, with the payment to Emma Dickenson, her heirs, executors, administrators, and assigns, of the sum of 7768*l.* 6*s.* 4*½d.*; and that Thomas Paine thereby promised and agreed to execute to Emma Dickenson a good and sufficient mortgage of all and every his said messuages, dwelling-houses, lauds, hereditaments, fee-farm or ground-rents, situate and lying in Somerset Place, including therein the four new erected messuages or dwelling-houses, subject to the several charges or mortgage incumbrances thereon, as soon as such mortgage could be prepared and tendered to him for execution.

The Master found, that in 1810, an agreement was entered into between Thomas Paine, of the one part, and William Broom, and James Chapman, a builder,

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of the other part, whereby, after reciting that Thomas Paine, at the time of the execution of the said agreement, was seised in fee simple, in possession of, in, and to a piece or parcel of land, in or upon which there were several springs of water, and that the same were situate, lying, and being in the parish of Walcot aforesaid, which was more particularly described in the plan in the margin of the said agreement; and, after reciting that the said William Broom and James Chapman were possessed of a certain parcel of land, situate in the said parish of Walcot, upon which the said William Broom and James Chapman had erected several houses, and then were erecting and building other houses, and then intended to erect and build several others, and which houses were intended to form a pile of buildings, consisting of thirteen houses, and to be called by the name of Cavendish Place: And, after reciting that Thomas Paine agreed with William Broom and James Chapman to supply all the houses to be built by William Broom and James Chapman, upon the said last-mentioned piece of land, with fresh water from the springs in the said first-mentioned piece or parcel of land, and to enter into such covenants for such purposes as were thereafter expressed and contained, it was witnessed, that the said Thomas Paine did thereby agree with the said William Broom and James Chapman, that the said Thomas Paine would erect and build, in or upon the said first-mentioned piece of land, a reservoir, to contain a sufficient supply of water for the houses to be erected and built, &c.; and that they, William Broom and James Chapman, their executors or administrators, should pay, or cause to be paid, to Thomas Paine, his heirs or

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assigns, certain annual rents for each respective house already or thereafter to be built on the said pile of buildings, called Cavendish Place, as therein-after particularly mentioned : And the Master further found, that the said houses in Cavendish Place and Cavendish Crescent, were accordingly built, and the said reservoir erected, and the main pipe and feather pipe and cisterns completed according to the agreement contained in the said two hereinbefore recited indentures of agreement. And he certified that an indenture was made and executed on the 31st day of August, 1815, between Thomas Paine of the one part, and John Lewis Fournier of the other part, whereby, after reciting that John Lewis Fournier had lent and advanced to Thomas Paine certain sums of money, making, in the whole, the sum of 700*l*.; and that John Lewis Fournier had engaged to lend Thomas Paine the further sum of 300*l*.; and also reciting that John Lewis Fournier had not then as yet received any security whatever for the monies so advanced, and had applied to Thomas Paine, who, being then incapable of effectuating a good and sufficient security, had proposed to give his bond for the said sum of 700*l*. and to enter into a covenant, therein-after mentioned, for granting and executing to John Lewis Fournier, a mortgage in fee, or for a term of years, of a messuage or tenement, which Thomas Paine was then building upon a certain plot of land, situate near Somerset House, in the parish of Walcot, and to assign to John Lewis Fournier, by way of mortgage, or by way of a further or collateral security, the beneficial interest in the said recited agreements of the 28th and 29th days of June, 1810, which said contract, it was



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agreed, should, with the indenture then in recital, in the mean time be deposited in the hands of John Lewis Fournier : And also reciting, that Thomas Paine, in part performance of his proposal, had, by his bond, bearing even date with the said indenture, become bound unto John Lewis Fournier, his executors, administrators, and assigns, in the penal sum of 1400*l.* with a condition, &c., it was witnessed that, in performance of the said proposals, in consideration of the said sum of 700*l.* so advanced, and of the further sum of 300*l.* intended to be advanced to Thomas Paine by John Lewis Fournier, Thomas Paine did thereby for himself, &c. covenant, &c. with John Lewis Fournier, &c., that he, Thomas Paine, his heirs and assigns, would, on or before the 1st of March, 1816, sign, seal, and deliver a good and sufficient indenture, or instrument, by way of mortgage, for the purpose of securing to John Lewis Fournier, his executors, &c. the sum of 700*l.* with interest for the same, together with the sum of 300*l.* intended to be advanced to or for the benefit of Thomas Paine, as aforesaid, with lawful interest thereon, with all other monies which, at the time of such indenture or instrument, by way of mortgage, should have been then advanced by John Lewis Fournier to Thomas Paine, or for his benefit, together with lawful interest upon all such last-mentioned monies; and Thomas Paine did thereby further covenant and agree, to and with John Lewis Fournier, that he and his heirs, executors, and administrators, would in and by such indenture or instrument, by way of mortgage, convey, release, assign, or otherwise assure, to John Lewis Fournier, his heirs, executors, administrators, and assigns, all that plot,

piece, or parcel of ground, situate near to or opposite Somerset House, in the occupation of Thomas Paine, and the said messuage or tenement then building and intended to be built thereon, &c.; and also the water-rents, respectively reserved in and by the said agreements or contracts thereinbefore severally referred to, and otherwise recited, together with the said contracts, and all deeds, muniments of title, and papers relating to the said premises respectively; and that the said two several contracts or agreements of the 28th and 29th days of June, 1810, were on or before the 31st of August, 1815, deposited by Thomas Paine in the hands of John Lewis Fournier, in whose custody the same then were.

The Master found, that the title deeds, evidences, and writings relating to the said pieces of land, called Lydes, or Great Lydes, conveyed to or in trust for Thomas Paine, had ever since the 10th of March, 1813, remained in the possession of John Slade, as the solicitor of Emma Dickenson, and that since the deposit of the title deeds, the house called the House of Protection, or Ivy House, had been built upon part of the premises formerly called Lydes, and comprised in the deeds so deposited with John Slade; and he found that the springs from whence the said houses, called Cavendish Place and Cavendish Crescent were supplied with fresh water, and, in consideration of which supply, the rents mentioned in the said several indentures of the 28th and 29th days of June, 1810, are reserved, arose from part of the said land, called the Lydes, and so conveyed to or in trust for Thomas Paine; and, in consideration of the facts therein stated, and of the evidence so laid before him, he

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certified that the securities of Emma Dickenson, by virtue of the said several agreements of November 2, 1807, June 24, 1808, September 14, 1808, and September 10, 1813, and by the deposit of the title deeds of the lands and premises, formerly called Lydes, or Great Lydes, extended over the whole of the said premises, and comprised the lawn in which the said reservoir was formed, and whence the houses in Cavendish Place and Cavendish Crescent were supplied with water, and also the said house called the House of Protection, or Ivy House; and he certified that by virtue of the said indenture of the 31st day of August, 1815, and by the deposit of the said several indentures of 28th and 29th days of June, 1810, the security of John Lewis Fournier extended over the water-rates reserved by the said indentures of the 28th and 29th days of June, 1810, and also the plot, piece, or parcel of ground, described in the said indenture of the 31st day of August, 1815, situate near or opposite Somerset House, in the occupation of Thomas Paine, and the messuage or tenement then intended to be built thereon, and which said messuage or tenement had since been built, and had been called the House of Protection, or Ivy House, but subject, as to such piece or parcel of ground, and messuage or tenement, to the prior security which Emma Dickenson acquired by the means thereinbefore mentioned.

The Appellants, Stephen Turner and Mary Fournier, took two exceptions to the report, the first of which exceptions was, that the Master ought not to have found that the security of Emma Dickenson, by virtue of the several agreements in the report referred to, of the 2d of November,

1807, 24th June, 1808, 14th September, 1808, and 10th September, 1813, and by the deposit of the title-deeds of the lands and premises formerly called Lydes, or Great Lydes, extended over the whole of the premises in the report mentioned, and comprised the lawn in which the reservoir therein-mentioned is formed, and from whence the houses in Cavendish Place and Cavendish Crescent were supplied with water, and also the house called the House of Protection, or Ivy House; and the second of such exceptions was that the said Master ought not to have found that the security of John Lewis Fournier, in the report mentioned, upon the House of Protection, or Ivy House, is subject to the prior security which Emma Dickinson acquired by the means thereinbefore mentioned.

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The exceptions were argued, on the 11th of March, 1826, before the Vice-Chancellor (Sir John Leach), who allowed the same.

William Henry Dickinson appealed to the Lord Chancellor, from the order of the Vice-Chancellor. The appeal was heard on the 19th of November, 1828, and the exceptions were overruled.

On the 19th of May, 1829, an order, or decree was drawn up in the said causes, whereby the plaintiff's original bill was dismissed with costs.

On a petition of rehearing, by a decree in the said causes, made by the Lord Chancellor, on the 10th of August, 1832, it was ordered, that it should be referred to the Master to whom the cause was referred, to take an account of what was due to the defendant William Henry Dickinson, as representative of Emma Dickinson, for principal and interest on the security which Emma Dickinson acquired as, in the said report dated the 20th of

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July, 1824, mentioned; and to tax the costs of William Henry Dickinson, of these suits; and upon the plaintiffs, Stephen Turner and Mary Fournier paying to William Henry Dickinson, what should be reported due for such principal, interest, and costs, within six months after the Master should have made his report, at such time and place as the Master should appoint, it was ordered, that William Henry Dickinson should re-assign the premises comprised in his securities, free and clear of and from all incumbrances, &c., and deliver up all deeds, &c. But in default of the plaintiffs paying to the defendant what should be reported due for such principal, interest, and costs as aforesaid, by the time aforesaid, the plaintiffs' bill was to stand dismissed out of Court, with costs, to be taxed by the Master. But in case the said plaintiffs should redeem the said defendant, it was ordered, that the said Master should take an account of what was due to the plaintiffs for principal and interest on their mortgage, and tax their costs of this suit, and compute interest on what they should have so paid to the defendant William Henry Dickinson; and upon the defendant William Henry Dickinson paying to the plaintiffs what should be reported due to them for principal, interest, and costs, together with what they should have paid to the said defendants, with interest thereon, as aforesaid, within three months after the Master should have made his report, at such time and place as he should appoint, it was ordered, that the plaintiffs should reconvey the mortgaged premises, free and clear of and from all incumbrances done by them, or any claiming by, from, or under them, and deliver up all deeds and writings in their

custody or power, relating thereto, upon oath, to the said defendant, or to whom he should appoint; and in default of the defendant paying to the plaintiffs what should be reported due to them for principal, interest, and costs, as aforesaid, by the time aforesaid, the said defendant was from thenceforth to stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption, of, in, and to the said mortgaged premises.

Stephen Turner and Henry Fournier appealed against the order of the 19th of November, 1828, the decree or order of the 19th of May, 1829, and the decree of the 10th of August, 1832, except so far as it reverses the decree or order of the 19th of May, 1829.

For the Appellant, *Mr. Knight* and *Mr. Lynch*.

The agreements of the 2d of November, 1807—the 24th of June, 1808—the 14th of September, 1808—and the 10th of September, 1813,—do not comprise the lawn, upon which the reservoir is situate, nor the house, opposite Somerset Place, called the House of Protection, or Ivy House.

The alleged deposit of the title deeds was not such a deposit as to create an equitable mortgage.

By the indenture of the 31st of August, 1815, and the deposit of the contracts, John Lewis Fournier had obtained a prior security to that of Emma Dickenson, upon the reservoir and house, called the Ivy House, or House of Protection, as well as upon the water-rents.\*

\* On the part of the Appellants, a passage in the printed case was proposed to be read, to which an objection being taken by the Respondent's counsel, that it did not appear in the recitals of the decree, Lord Brougham said, that the Appellant, if he intended to object, should have applied to the House to have the passage struck out of the printed case.

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For the Respondents, *Mr. Pemberton* and *Mr. Simpkinson*.

Under the circumstances stated in the evidence produced before the Master, the securities of Emma Dickenson under the agreements of the 14th of September, 1808, and the 14th of September, 1813, according to the true construction of the agreements, extended over the whole of the lands and premises formerly called Lydes, or Great Lydes, and comprised the lawn in which the reservoir was formed, and the springs from which the reservoir and the houses in Cavendish Place and Cavendish Crescent were supplied with water, and also the house called the House of Protection, or Ivy House.

If it were otherwise doubtful whether the two agreements or either of them would alone have admitted of such construction, the securities of Emma Dickenson under the two agreements, and also the deposit of the title-deeds of the lands and premises formerly called Lydes, or Great Lydes, clearly extended over the whole of the premises, and comprised the lawn and reservoir and springs of water, and also the house called the House of Protection, or Ivy House.

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*Lord Brougham*.—I have no hesitation whatever in recommending your Lordships to come to a determination in this case, in favour of the decree of the Court below; and I think there is sufficient for you to do so on the first point, without going into the second point: that is, on the question of construction of the two mortgages of the 14th September, 1808, and the 14th September, 1813, which in fact are to be considered together; and I have

no doubt (as I shall be able to show in the opinion I shall offer to your Lordships), that the Master who originally investigated this matter, after entering in detail into the evidence connected with the question, came to a right and sound conclusion. This opinion, however, was displaced for the moment by his Honour the then Vice-Chancellor, but was afterwards replaced by the then Lord Chancellor, the noble and learned Lord now on the Woolsack.

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The question which we have first to consider is this: Whether the words in the deeds to which I have referred, are comprehensive enough to carry with them the ground on which the Ivy House is built, and that part of the ground on which the water was raised and the reservoir constructed, or was there an intention to reserve these under another qualification?

If a grant was not absolutely made in this equitable mortgage, to cover the Ivy House and water-course, no one can doubt this principle, that the proof that such was not the intention lies on the party who would exclude them. The question, therefore, would be more accurate if stated thus: Whether the words of the conveyance are sufficient to carry the Ivy House and reservoir; and proof sufficient has not been adduced that such was not the intention; it must be taken that they were so carried by those instruments, unless the contrary intention appears, namely, an intention to except them from the operation of these instruments, which intention might be shown either by manifest implication, or by evidence of the transaction itself? My opinion is, that the words are as large as can be used for such a purpose, and that the



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terms of the instrument are sufficient to carry the premises in question. It says, "I, the said Thomas Paine, do hereby charge and subject the two messuages or dwelling-houses, now erecting and building, &c. with their appurtenances, respectively situate, lying, and being in a certain place or pile of building, called Somerset Place, in the parish of Walcot in the county of Somerset, and near the city of Bath, and likewise all and every other my messuages or dwelling-houses, lands, hereditaments, and fee-farm or ground rents, also situate and lying in Somerset Place aforesaid, and adjoining the said before-mentioned unfinished messuages or dwelling-houses," &c. There he uses the terms "pile of building called Somerset Place;" it is also used very plainly in the subsequent agreement. If the expression had been used as applicable to Somerset House in London, could it be contended that you would not include the area of the building, the great square where the statue stands? — certainly not. Yet, at the same time, if you asked where the Treasurer of the Navy lived, you would be told in Somerset House; and according to this argument, it would be said that the expression could not be taken to embrace the whole of the buildings — there were some of them not connected with the rest. The one term must be considered to embrace the whole. He uses the words in both senses. He says, "all and every other my messuages or dwelling-houses, lands, hereditaments, and fee-farm rents, also situate and lying in Somerset Place aforesaid, and adjoining the said before-mentioned four messuages or dwelling-houses," &c.: that will apply to the whole, including roads, &c. The question then is, Does the land in question lie in

Somerset Place, and is it adjoining to the messuages or dwelling-houses alluded to? Now, my opinion is, on comparing the terms of the deeds with the plan before your Lordships, that it does lie in Somerset Place, and that it is adjoining to the premises. But it was said, in argument, that it was very unlikely that he would erect a house of this description, and on property of this peculiar kind; and that it could not be intended that these should pass under these general words, without specifying them by a particular description: but the answer is, that in 1808 there was no such thing in existence, nor could any person, in drawing the conveyance, have dreamt of such a thing, where there is no evidence to show that it was even in contemplation; and no one who had not the gift of prophecy could have foreseen the event. If there was no evidence of the fact or conjecture, there was nothing to carry the case a step further. Why was not this mentioned in the deed, but because he did not know of their actual or probable existence. Unless he had excepted every house he might in future build, these words to which I have referred would be sufficient to carry that house as well as the reservoir. It was said that he was very unlikely to lay out his money, if he thought it would be included in the mortgages he had granted. Why so? If he would be benefited by the outlay: he was the mortgagor, and the equity of redemption was in him: this is done every day. Then it was said, that roads existed before this building was contemplated, and that there was a narrow strip of ground which formed a boundary on the south of one of these roads: but all that we know is, that it was an open space of the nature of a waste

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nothing to form a natural boundary. But it was said, that we did not find that narrow strip mentioned within the boundary; but why are we to exempt that strip of ground, any more than any other portion of the property? If the house existed on that strip of ground, or if the road had been mentioned as a boundary, or if it had been said that the land was enclosed by a wall, so that it might have been clearly ascertained what was the boundary, the case would have been different; but at the time when these improvements were made, there is not the least doubt that there was not any natural boundary—there was nothing to distinguish from the rest, the water of the reservoir, or the strip of ground on which the Ivy House has since been built. I have really no doubt whatever, that the terms “Somerset Place” were meant to include the roads and all the property, and that there was no exception, or intention of exception, as to any part of it; and if it is not proved that there was such exception, or intention of exception, or if no limit or boundary is expressed in these deeds, I am bound to think that the Master was correct, and that he came to a right conclusion. This will render it unnecessary for me to go into the second question.

I therefore move your Lordships that the Judgment of the Court below be affirmed; but as I think there is some hardship in the case, I move that the Judgment be affirmed without costs.

Judgment affirmed.

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## ENGLAND.

(COURT OF EXCHEQUER.)

DE LA POER, Marquis of Waterford *Appellant*;THOMAS KNIGHT, Clerk - - *Respondent*.

A bill for discovery and relief upon a claim of a rector for tithes being filed against an infant, an answer was put in by his guardian. The infant having attained his majority, the Plaintiff filed a supplemental bill, stating the fact of the infant's having come of age, and other facts alleged to have been recently discovered, or come to the knowledge of the Plaintiff: the supplemental bill also comprised the same statement of facts as the original bill, together with some other facts not supplemental nor alleged to have been newly discovered, and interrogatories founded upon all the statements: it prayed only a discovery. To this supplemental bill a general demurrer for want of equity was filed. The demurrer was over-ruled upon the ground that the Plaintiff was intitled to a discovery as to all the matters in the supplemental bill which were comprised in the original bill and not answered; and also as to matters supplemental and those alleged to have been newly discovered; and although he was not intitled to a discovery as to matters not supplemental nor alleged to have been newly discovered, the demurrer was bad, as covering too much. This judgment was affirmed on appeal.

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THE Respondent filed his bill in Trinity term, 1830, in his Majesty's Court of Exchequer, against the Appellant, and divers other persons. The bill was amended under an order dated the

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26th of June, 1830, and again amended under an order dated the 7th of May, 1831.

The Appellant, on the 19th of February, 1831, being then an infant, put in his answer to the bill by guardian, refusing to answer some of the matters in the original bill.

In Hilary term, 1833, (the Appellant having some time previously attained his age of twenty-one years) the Respondent filed a supplemental bill against the Appellant, stating that the Respondent, was, in November, 1819, duly presented and instituted to and inducted into the rectory and parish church of Ford, in the county of Northumberland; and that he had ever since been and still was the rector thereof, and as such rector had ever since his presentation, institution, and induction, been and then was well entitled to have, receive, and take, all and singular the tithes, as well great as small, yearly arising, growing, renewing, and increasing in and throughout the parish of Ford, and the titheable places thereof, and that the Appellant was, at the time of filing the original bill, and had ever since been and then was the patron of the rectory of Ford, and lord of the manor of Ford, and an occupier of land within the rectory of Ford, and the titheable places thereof, and that several of the owners and occupiers of land and farms within the parish of Ford, and the titheable places thereof, neglected or refused to set out or render to the Respondent the tithes of the titheable matters and things had and taken by them respectively upon and from off their respective farms and lands, to which the Respondent was well entitled, and neglected or refused to make any recompense or satisfaction to the Respondent for the

value thereof; and that the Respondent therefore, in or as of Trinity term, in the eleventh year of the reign of his late Majesty King George the Fourth, filed his bill of complaint in the said Court, (and which was afterwards amended and reamended by orders of that Court, dated the 26th of June, 1830, and the 7th of May, 1831, as before mentioned) against the Appellant, and against John Carr, and divers other persons; thereby stating as therein was stated, and praying that they might be decreed to come to a fair account with the Respondent for the single value of the tithes of the titheable matters and things in the said original bill mentioned, had, and taken by John Carr, deceased, and Edward Grey, and William Wilson, in the said original bill severally mentioned; and the said Defendants respectively, upon and from off their respective farms and lands, and during the respective periods in the said original bill mentioned, and to pay unto the Respondent what should appear to be coming to the Respondent from them respectively, on the taking of such account; and that the Defendants John Carr, &c. might respectively admit assets of John Carr, deceased, Edward Grey and William Wilson respectively come to their hand sufficient to answer the demands of the Respondent in that suit; or that the usual accounts might be ordered to be taken of the personal estate and effects of John Carr, deceased, Edward Grey, and William Wilson, respectively, the Respondent thereby waiving all pains and forfeitures which might have been incurred by the said John Carr, deceased, Edward Grey, and William Wilson, or by the Defendants respectively, for subtracting and not setting out the said tithes.

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The supplemental bill also stated, that the several Defendants to the original bill put in their answers thereto, and that in particular the Appellant, who was at that time an infant under the age of twenty-one years, by the Right Honourable George Thomas Beresford, commonly called Lord George Thomas Beresford, his guardian, put in his answer to the bill, and thereby amongst other things stated and alleged that the parish of Ford was a rectory, and comprised within its bounds or precincts, amongst other lands, the manor of Ford; and that the manor of Ford had always, as the Appellant believed, from time whereof the memory of man was not to the contrary, contained and did then contain within its boundaries upwards of 8000 acres of land, altogether of great value, and then producing, as the Appellant believed, an annual rental of upwards of 10,000*l.*; and that the whole of the said 8000 acres of land and upwards, contained in the manor of Ford, had always been, from time whereof the memory of man is not to the contrary, and were then situate lying and being within the parish of Ford, and that from time whereof the memory of man was not to the contrary, there had been, as the Appellant believed, always payable by the lord or owner of the manor of Ford for the time being, and such lord or owner for the time being had, as the Appellant believed, always until the time thereafter mentioned in that behalf, paid, by equal half-yearly payments, at Lady-day and Michaelmas-day in each year, or as soon after as the same was demanded, to the parson of the parish of Ford, for the time being, the yearly sum of 40*l.*, for the maintenance of Divine service

there, for and in lieu and in contentation of all manner of tithes arising, growing, renewing, or increasing within the manor of Ford; and that the lord or owner of the manor of Ford for the time being, or his assigns, had, as the Appellant believed, always from time whereof the memory of man was not to the contrary, used, in respect of the said yearly sum of 40*l.* so paid to the parson of the parish, to have and of right ought to have, the tenth of all manner of titheable things arising, growing, renewing, or increasing within the manor of Ford, or any part thereof. The supplemental bill also stated that the Respondent, by his amended bill, further stated, that the Appellant had certain deeds, instruments, books, accounts, receipts, papers, and writings, relating to the tithes of the parish of Ford, in his custody or power, and sought a discovery thereof from the Appellant; but the Appellant did not, by his answer, make any answer as to such deeds, instruments, books, accounts, receipts, papers, and writings, but was wholly silent as to the same; and that by the practice of the said Court, the Respondent was not allowed to take exceptions to the answer of the Appellant for insufficiency, inasmuch as the Appellant was then an infant.

The supplemental bill further stated, that the Respondent had lately discovered that in times past the lords of the manor of Ford, who were patrons of the rectory, and under whom the Appellant claimed, used, upon presenting to the rectory, to require and take from the person about to be presented, who used to give a penal bond, that he would not demand or take the tithes arising from the farm and lands within the manor of Ford, but would take and accept a

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sum of 40*l.*, or some such sum, as a satisfaction for the tithes, or that they used to take some bond to some such effect : and that the Respondent had also discovered, that in time past the rectors of the parish of Ford, when no such bond as last-mentioned was given, used, upon or soon after their induction, to make or grant a lease to the then lord of the manor of Ford, of all the tithes of all titheable matters arising upon or from the farms and lands within the manor of Ford ; and that the sum of 40*l.* a year, or some such annual sum, was the rent reserved in such leases to be paid half-yearly to the rector by the lord ; or some leases to some such effect were made by some of the former rectors of the parish to some former lord of the manor ; or there were some instruments or agreements in writing, whereby the sum of 40*l.* was affixed as the whole amount to be received by the rectors from the lords for the tithes of such lands as aforesaid within the manor of Ford, or for some tithes within the parish of Ford ; and that the Respondent was advised and believed, that the payment of 40*l.*, in the answer of the Appellant stated to be an immemorial customary payment, in fact had its origin in such bonds and leases or other instruments or agreements as were thereinbefore mentioned.

The supplemental bill further stated, that the Respondent had lately learnt that in the year 1573, a claim was made in respect of the tithes arising within the manor of Ford, by the then rector of the parish of Ford, by name William Bradforth, against William Carr, the then lord of the manor, and that a suit was instituted by the said William Bradforth, against the said William Carr in respect

thereof, and that the same was heard before the council in the town of Berwick-upon-Tweed; and that on or about the 14th October, 1573, a decree or decretal order was made, and which was entered in the books of the council of the town, and which was in the words and figures following; (that is to say,) "It is ordered that all controversies " between the said parties touching the parsonage " of Ford, with the appurtenances, &c. shall be arbitrated, judged, ended, and determined by some " arbitrators indifferently named, elect and chosen, " as well by the said Mr. William Bradforth, as " also by the said Mr. William Carr, viz. by Sir " Cuthbert Collingwood, of Esslington, knight, " Thomas Foster, of Edderston, Esquire, Thomas " Bradforth, baron of Bradforth, and Henry Hagston, lord of Haggerston; and that whosoever " of the said parties above named shall break about " any cause of impediment of the same award, " that he the said party so being in default shall " forfeit unto the other party the sum of 100*l.* of " good English money. Item, the said arbitration is to be given up in writing under the hands " and seals of the said arbitrators at Alnwick at " or before the 4th of January next ensuing. Item, " the said tithes, &c. now in controversy shall not " be stirred or meddled withal by any of the said " parties in the meantime upon the penalty above " rehearsed." And that some award or arbitration was duly made by the arbitrators named in the order, by which it would appear that no such sum as 40*l.* had been immemorially paid by the lords of the manor of Ford to the rector of the parish of Ford, in lieu of tithes, as was alleged by the Appellant, or by which it would appear that

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tithes in kind were then and now are due to the rector of Ford from the owners and occupiers of land within the manor of Ford: And that the Respondent being advised that the production of such award or arbitrament was most material for the support of his aforesaid claim to tithes, had caused diligent search to be made in and amongst his deeds and papers, and also amongst the records kept at Berwick aforesaid, and elsewhere, to endeavour to discover the original of the award or arbitrament, or some copy thereof, but that he had failed to find the same or any copy thereof, nor was it or any copy of it amongst his deeds, papers, or writings; and that the Respondent had lately discovered that the Appellant had the said award and arbitrament in his custody, possession, or power, or some copy of, or extract from the same.

The supplemental bill further stated, that within the parish of Ford there was a district or portion of land, consisting of about 600 acres, and called or known by the name of the Catford Law or Hay Farm, which formerly belonged to the lords of the manor of Ford, and was part and parcel of the manor of Ford, and was held by the lords of the manor as part and parcel thereof; but that the Respondent had lately discovered that some time between the year 1598 and the year 1660, or at some time thereabouts, the then lord of the manor of Ford sold the district or portion of land called Catford Law to one of the family of the Carrs of Etall, and that the same had ever since remained and then was held by the family of the Carrs of Etall, and that the owners and occupiers of the land comprising the district called Catford Law or Hay Farm, and of every part thereof, had ever

since the aforesaid sale thereof, paid tithes of all titheable matters and things, had and taken by them from their said lands, to the rector of the parish of Ford; and that within the parish of Ford, there was a portion of land or district called or known by the name of Heatherslaw, and which then belonged to the Appellant, and formed part of the lands in respect of which he claimed that the sum of 40*l.* was payable in lieu of tithes; and that the Respondent had lately discovered that the district of Heatherslaw was formerly a manor of itself, and was not part or parcel of the manor of Ford, and did not belong to the lords of the manor of Ford, but belonged to some other person or persons, whose names were not known to the Respondent before it became the property of the lords of the manor of Ford, and that tithes in kind were always paid by the tenant of the lands in Heatherslaw aforesaid to the rectors of Ford, for the time being, until some time between the years 1685 and 1717, when Francis Blake, or Sir Francis Blake, knight, the then lord of the manor of Ford, purchased the said manor or district of Heatherslaw of the then owner thereof, whose name was also unknown to the Respondent; after which time, and not before, the tithes of the land within Heatherslaw aforesaid, were introduced into and included in the aforesaid bonds, leases, or instruments, whereby the said sum of 40*l.* was received by the rectors of Ford, in lieu of the tithes of the lands the property of the lords of Ford, and that the district of Heatherslaw was not, nor ever had been, part of the manor of Ford.

The supplemental bill further stated, that the Respondent had lately discovered that the Ap-

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pellant had, at the time of filing the supplemental bill, in his possession, custody, or power, divers of the bonds and leases, or other instruments or agreements in writing, thereinbefore mentioned; and had also divers old deeds, instruments, and writings, whereby it would appear that the district called Catford Law, otherwise Hay Farm, formed part of the manor of Ford, and that the Appellant had also the deeds of conveyance of the said Catford Law, otherwise Hay Farm, which were executed on the occasion of the sale thereof thereinbefore mentioned; and that he had also divers deeds, instruments, and writings, whereby it would appear that the district called Heatherslaw was a manor of itself, and was not part or parcel of the manor of Ford, and that tithes in kind were formerly paid for lands within Heatherslaw: And that the Appellant had also the deeds of conveyance of the district or estate called Heatherslaw, or of some part of it, which were executed on the occasion of the said purchase thereof thereinbefore mentioned; or that he had some of them, or some copy of, or extract from, or abstract of, the same, or some of them, by which it would appear that the said Catford Law, otherwise Hay Farm, formed part of the manor of Ford, and that the district called Heatherslaw was not part of the manor of Ford: and that the Appellant had also in his possession, custody, or power, divers other deeds, papers, and writings, whereby it would appear that the sum of 40*l.* had not been immemorially paid by the lord of the manor of Ford to the rectors of the parish of Ford in lieu and contentation of all manner of tithes arising within the manor of Ford, or within such places, or from such lands as

were then, that is, at the time of filing the supplemental bill, alleged to be the manor of Ford, or which in some way tended to shew the Respondent's title to tithes in kind within the manor of Ford.

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The supplemental bill further stated, that the Appellant had then attained his age of twenty-one years, and that all the answers of the Defendants to the Respondent's original bill of complaint had been replied to, and that rejoinders had been filed, and that the Respondent was advised that it was material for the support of his case, on the hearing of the suit, and in order to shew that no such payment as that alleged in the Appellant's answer had existed immemorially, that the said bonds, leases, or other instruments or agreements in writing, and the award or arbitrament, or some copy thereof, and the deeds, papers, and writings thereinbefore mentioned, should be produced to the Respondent for his inspection, and at the hearing of the cause, to which the Respondent was advised he was well entitled, and that he had therefore applied to the Appellant to produce and shew the same to him, the Respondent, and to make a full disclosure of all the matters and things in the supplemental bill contained; but that the Appellant absolutely refused so to do. The supplemental bill contained interrogatories in the usual manner, and many of the interrogatories contained in the supplemental bill were the same as interrogatories contained in the original bill. The supplemental bill prayed that the Appellant might make a full and true disclosure and discovery of all the matters and things therein contained.

The Appellant, on the 21st of February, 1833, put in a demurrer to the supplemental bill on the

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ground that the Respondent was not, in equity, entitled to the discovery sought for by the supplemental bill from the Appellant, or to any part of such discovery.

The demurrer was heard on the 4th of May, 1833, before Lord Lyndhurst, then Lord Chief Baron, by whom the demurrer was overruled on the ground that the Respondent would have been entitled to an answer from the Appellant (but for the Appellant's then infancy), to all the interrogatories contained in the original bill, and that the Respondent was therefore, on the cessation of such infancy, entitled to an answer to such of the statements interrogated to in the supplemental bill as had also been interrogated to in the original bill; and that although the Respondent was not entitled, to any answer to such parts of the supplemental bill as were not contained in the original bill nor alleged to have been newly-discovered, the demurrer must be overruled, as covering too much, namely interrogatories, which his Lordship held the Appellant was bound to answer, as well as interrogatories to which he was not bound to answer.

The appeal was from the order overruling the demurrer.

For the Appellant, Mr. *Swanston* and Mr. *Purvis*.

The question here is whether a plaintiff can by supplemental bill obtain a discovery which he could not have upon his original bill. The facts stated in the supplemental bill as the Plaintiff alleges, have lately come to his knowledge. What facts? except the event of the Appellants coming of age, which can give no right to discovery; especially of documents relating to the Appellant's title,

and the existence of which, if real, the Respondent by ordinary diligence might have known at the institution of the suit. This is a species of discovery which could not be obtained by amendment, much less by supplemental bill. If any right to discovery existed, the Respondent should not have filed his bill against an infant from whom no discovery can be compelled. If no right existed at the institution of the suit, how can it have arisen since? The right is supposed to spring out of the absence of a right in the commencement of the suit. There is no authority in the books, not even a *dictum*, in favour of such a proposition. All the rules of the Court, as to infancy, are for its protection; and in the few cases on which the Respondent relies, the parties were adults. The Plaintiff paying costs may dismiss the bill, and upon a new bill would be entitled to discovery *Huggins v. Alexander*.\*

Infants have peculiar privileges. The costs of an infant's contempt for not answering have been paid by the Plaintiff *Parkins v. Hammond*.† The answer is put in by the guardian, and the subpœna to hear judgment is served upon him; *Taylor v. Attwood*.‡ Nor can the guardian's answer be read against the infant *Eccleston v. Petty* §; yet the answer is dealt with as sufficient, for the bill may be dismissed, or an injunction may be dissolved on the infant's answer by guardian, *Lucas v. Lucas*, || *Meredith v. O'Donovan*.¶ An infant has other privileges: on coming of age he may put in a new answer, and make a better defence *Bennett v. Lee* \*\* or a further and amended answer before he

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\* West, 131. † Dickens, 287. ‡ 2 P. W. 643. § Carthew, 79.  
|| 13 Ves. 274. ¶ In Chanc. not reported. \*\* 2 Atk. 531.



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comes of age to vary his defence and retract what his guardian admitted, *Savage v. Carrol*.\* If the infant acquiesces in the guardian's answer after he comes of age, it is presumed that he abides by it.† A plaintiff instituting a suit against an infant knows the practice of the Court by which he is bound, and undertakes to prove his case. He cannot delay the hearing until the infant comes of age; and at the hearing, if he is not in a condition to sustain his suit, even for want of a sufficient answer, the bill must be dismissed. If he cannot postpone the hearing during infancy, why should he be permitted to do so by a supplemental bill after the majority of the infant? He makes his election to proceed during the infancy of the defendant, and he is bound to proceed under the disadvantage of his own choice. The right now claimed in this suit, is to have by supplemental bill an answer to the original bill, to have the double advantage of a suit against an infant and an adult. If the ground for this novel proceeding is that the answer is not full, it should take the form of exceptions. How otherwise is the fact of sufficiency or insufficiency to be ascertained? According to the doctrine and practice which would be established by the judgment, a supplemental bill for discovery might in all cases be filed when the infant comes of age, although an answer put in by the guardian were full.‡ A supplemental bill for a discovery only is a solecism in pleading. The argument, that there would be a defect of justice if this anomaly were not permitted,

\* 1 Ba. & Be. 548.

† See *Lord Guernsey v. Rodbridge*, Gilb. Eq. Rep. 3.

‡ See Mitf. 48, 49. 263.

would apply to all cases where infants are defendants; such cases are of frequent occurrence; yet no authority or precedent for the doctrine is to be found. This is decisive against the judgment, that by supplemental bill against an infant becoming adult, the plaintiff may have a discovery which he could not have against the infant. He cannot have it in the original suit; and if it may be enforced by supplemental bill in one case it may in all cases. The analogy of suits originally against adults, upon which ground the case was argued in the Court below, is not applicable to the case of suits against infants. The mode of proceeding is entirely different.

A supplemental bill requiring discovery must be founded upon some event which has happened or has come to the knowledge of the Plaintiff after the cause was at issue, and in such case, the leave of the Court to file the bill must be obtained. These are additions to the original bill, but here the new pleading is a mere substitution. The original bill was sufficient, and there was no defect to be supplied. Lord Redesdale, by the passages \* on this subject in his book on pleading, could not mean that such a supplemental bill of discovery could be filed at any time. The record in this case was complete. The course taken by the Plaintiff has left him in a difficulty. Can he complain of that circumstance? Try the case by this test: The answer is, or is to be deemed sufficient, since no exceptions can be taken. In that state of the pleadings could the Plaintiff resist a motion for dismissing the bill, could he resist a motion to dissolve an injunction upon a bill for relief?

\* See Mitford's Pleadings, 48. 263.

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In the judgment below the rule is laid down too extensively. *Usborne v. Baker* \* was cited as an authority. But there was supplemental matter to ground the discovery. No doubt such a bill may be warranted by circumstances and events, but not against an infant upon the mere fact of his coming of age. *Boeve v. Skipwith* † was also cited and relied on. The circumstances do not clearly appear, but the bill in that case certainly was not merely for discovery — it was to put new matter in issue. Here is nothing to put in issue but that the Plaintiff has attained his majority. *Goodwin v. Goodwin* ‡ is not in point, and there is not sufficient authority for Lord Redesdale's proposition. *Colclough v. Evans* § was decided after the issuing of the new orders in Chancery, and even under these a reason must be given.

For the Respondents, Mr. Boteler and Mr. Loftus Lowndes.

The privilege of an infant ceases when he comes of age. He may then be taken upon an attachment issued during infancy. || In *Meredith v. O'Donovan* ¶ the coming of age was stated as supplemental matter, and there was no demurrer. If an infant, as it is contended, may put in a further answer when he comes of age, would not that be a proof that the first answer is treated as formal and ineffectual, and ought not the right to compel an effectual answer to be reciprocal? Where he brings the case to a hearing it has been held to be an adoption of the answer. But in

\* 2 Mad. 379. † 2 Rep. in Ch. ‡ 3 Atk. 371.

§ 4 Sim. 76. See *Crompton v. Wombwell*, id. 628,

|| *Lucas v. Lucas*, 13 Ves. 371.

¶ In Chanc. not reported.

*Kelsall v. Kelsall* \*, it is denied that upon coming of age he may make a new case.

The doctrine of Lord Redesdale on this question is founded upon the authority of *Boeve v. Skipwith*. † The bill in that case does not appear to have been for relief; it was understood by Lord Redesdale to have been a bill for discovery. He says in one passage, “Where the imperfection of “the suit arises from a defect in the original bill or “in some of the proceedings upon it, and not from “any event subsequent to the institution of the suit, “it may be added to by a supplemental bill merely. “Thus a supplemental bill may be filed to obtain “a further discovery from a defendant, &c. where “the proceedings are in such a state that the original bill cannot be amended for the purpose.” ‡ Here, the defect is, that the Defendant being an infant, the Plaintiff could not have relief by means of the discovery. In another passage § Lord Redesdale says, “If a supplemental bill is occasioned “by an event subsequent to the original bill, “it must state that event, &c., for if the supplemental bill is not for a discovery merely, the cause “must be heard upon the supplemental matter.” In a third passage he says ||, “If any event “happens which alters the interest of any party, “&c., the plaintiff may file a supplemental bill “&c., and if the plaintiff thinks, some discovery “from the Defendant which he has not obtained “is necessary to support his case, he may file a “supplemental bill to obtain that discovery.” This is a general proposition not limited by any excep-

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\* 2 M. &amp; K. 409.

† 2 Rep. in Chanc. 142.

‡ Mitf. Plgs. p. 48.

§ P. 59.

|| P. 263. 3d ed.

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tion. In support of an action at law, a bill of discovery may be filed at any time.

It is argued upon the assumption that there have been no precedents for this practice — that there is some insuperable difficulty in admitting it; but this reasoning has not prevailed in former cases. *Kelsall v. Kelsall*. \* In *Milner v. Lord Harewood* † Lord Eldon says, “If a new fact happens after publication, which it is material to have before the Court in evidence, when the original cause “is heard, &c., if discovery “is required the plaintiff should file a bill of discovery merely.” In *Usborne v. Baker* ‡ a supplemental bill of discovery inquiring as to material facts which occurred subsequent to the filing of the original bill, was held good.

As to the objection against admitting two defences, in this case it is inapplicable, for the first answer is a mere formality, and by requiring a substantial answer, neither damage nor inconvenience will ensue, nor can any unfair use be made of the proceeding. The suggestion that the Plaintiff might dismiss the old and file a new bill is mere delusion. He might not be able to make out his case against other Defendants, and by the new act must lose the benefit of the account beyond six years. If this proceeding is not permitted, a plaintiff can have no discovery in case of infancy, for (as it is argued) there can be no exceptions and no amendment.

In the reply, *Richmond v. Tayleure* §, and *Napier v. Lord Effingham* ||, were cited.

*Lord Brougham* (at the conclusion of the argument): This is a case of importance, and of the

\* *Ante*, p. 323.

† 17 Ves. 148.

‡ 2 Mad.

§ 1 P. W. 734.

|| 2. P. W. 401.

first impression, if the absence of direct decision upon the very same facts can make it so. But not so, having regard to the principle of former decisions, and the current of cases decided, proceeding on similar principle. It does not follow because there is no direct case on the point, that upon a bill during infancy, it is not competent to the Plaintiff, when the infant attains majority, to call for his answer, and obligatory on the infant to give the discovery sought. If a principle is established, and affirmed by decision upon one state of facts, it is followed out and applied to other cases in a course of judicial decision, and, when a new case arises within the same principle, why should the application of it be withheld? The absence of reported decisions arises in some cases from the rule of law being settled, and the practice or doctrine unquestioned, as in many familiar instances. In this case I should desire and propose to postpone the judgment, that the House may consider the question, and that I may consult the Judges in the courts of equity, on the present question of practice. In the absence of any authority as to the practice, I should propose to decide the question on the ground of principle.

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*Lord Brougham.*—This was an appeal from a decision of my noble and learned friend, now Lord Chancellor, when he was Chief Baron. Upon the hearing, I had a very strong inclination of opinion in favour of the decision, but I postponed recommending to your Lordships to give judgment of affirmance, because it was admitted upon all hands to be the first decision that had been pronounced upon a question, which was very likely to occur fre-

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quently in practice, and consequently, that it ought to be well considered as establishing a rule to govern future cases. I cannot entertain any doubt upon the principle upon which this case was decided, that a failure of justice would ensue if the discovery was evaded. In a bill for a discovery, whether it be to aid a trial at law, or in order to obtain equitable relief, if you cannot get that relief by examining witnesses, you may obtain it by wringing the conscience of the party, to obtain his confession, in aid of proceedings at law, or to establish the title to equitable relief. There might otherwise be a failure of justice. Witnesses, perhaps, will not tell the whole truth in a court of law: witnesses in equity, when examined on interrogatories, perhaps will not tell the truth, and consequently the practice of the courts of equity, and the principles of our law entitle a party to wring the conscience of his adversary, and obtain that discovery as ancillary to the attainment of justice, whether in law or equity. Then, if I file a bill against an infant, and if his answer is put in, and sworn by the guardian, and not by him, it is certain that that answer can no more be read in evidence, either in law or equity, than if I had not filed a bill, nor obtained any answer, and consequently, not obtained any discovery whatever. It is an imperfect and fruitless discovery that I have obtained.

It is no doubt very clear that you could not read the answer of the guardian; it would be no evidence whatever; and it seems to be clear that it would be of no use in any action. Now shall a party in such a case be defeated of his right, the infant coming of age between the time when the

original proceeding is instituted, and the final end is made of it, by the disposal of the suit? Shall his object be frustrated by the infancy of the Defendant, when he commenced his suit, or shall he not be allowed to file a supplemental bill, stating the fact, that the infant has come of age, and proceeding upon that fact which has come to his knowledge, and which, attending to the technical rules which govern such cases, must have come to his knowledge after the cause was at issue? Because the fact did not exist at that time, shall he not be allowed, by means of a supplemental bill, to obtain an available answer? The demurrer says no. It does not say that the right of discovery is to all intents and purposes at an end; but it says that this suit must be at an end; that the Plaintiff must dismiss this bill paying the costs, that he must incur a certain delay; that he must file a new bill, and get an answer from the adult defendant, which will be available for discovery, in support of the cause. Can any thing be more cumbrous, more inconvenient, or more senseless than such a rule would be, driving him to dismiss his bill at his own cost, and to file a new bill for the purpose of getting an answer?

It appeared to me that those which I have stated were the principles upon which this case should be governed and decided, but I thought it was very likely that what was said to be a case of the first impression was not so, and that it might be like many other cases which had never been much doubted, and in which, therefore, the question had never been raised; and I therefore said, that I should take an opportunity of consulting upon this question, those learned Judges and experienced

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practitioners, the Master of the Rolls and the Vice-Chancellor. I have already done so, and they have neither of them any doubts upon the subject. They take precisely the same view of it which I have done; it was not upon the merits of the case that I consulted them, but upon the practice of the Court. We were told that there were no cases, and they are not quite sure that they recollect any case in which such a bill has been admitted, but they say, that it is so perfectly consistent with all the principles which guide the practice of courts of equity that they should not, as counsel, have hesitated (and that is a strong authority coming from men of such skill and experience as draftsmen,) in advising this course of proceeding, but would have done so as a matter of course, and that they should have been surprised if there had been any objection taken to it, and, consequently, they would have been surprised if a demurrer to a supplemental bill under such circumstances had prevailed.

These opinions confirm my views as to the reason why this happens to be a case of the first impression as far as decision goes, that it is only because nobody ever thought of demurring to such a bill. The authority of those two learned persons seems to shew that it is so clear, that parties have never doubted about it. But it is unnecessary to enter into the question, whether there have been decisions; it is quite sufficient that it is according to principle: there being no decision upon the very point, proves nothing but the novelty of the demurrer. It is the application of a well known principle to facts which justify that application, and, consequently, it cannot be said to be introducing any novelty what-

ever, there being no decision the other way. It would be a greater novelty if we were to decide in favour of this demurrer, and against the supplemental bill; for, that being against the principle, we should be making an innovation and change in the law. I therefore entertain exactly the same opinion which I did at the hearing of this case. I postponed advising your Lordships so to decide, merely for the reason which I have given; namely, to obtain information. That which I have obtained is perfectly satisfactory; and I now move your Lordships, that this judgment pronounced by my noble and learned friend, when Chief Baron, be affirmed.

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*The Lord Chancellor.* — The Defendant having attained his age subsequently to the filing of the original bill, the Plaintiff could not introduce the fact by way of amending the statement of the original bill. He must file a supplemental bill, for the purpose of getting an answer to that fact; and it is because he could not obtain an answer to that fact under the original bill, that he was entitled to it by way of a supplemental bill, if the infant comes of age after the original bill has been filed, when it is too late to amend. In the case of an infant you can make no use by way of admission of the answer of the guardian. Under such circumstances it appears to me that, according to principle, you may be entitled to file a supplemental bill, in order to get an answer as to facts which are material, when you cannot obtain an answer to the original bill. If you cannot have discovery in this way, the consequence would be that which was referred to by my noble and learned friend, that you must dismiss the bill, and

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begin *de novo*, which would produce unnecessary expense, and be of advantage to neither party. For these reasons, I thought that I was justified in pronouncing the decision in question. I am very happy to find that it is supported by the opinion of my noble and learned friend, and by that of the learned judges to whom he has referred. I think the costs should be given in this case.

Judgment affirmed, with 100*l.* costs.

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THE JUDGMENT PRONOUNCED IN THE EXCHEQUER.

*Lord Lyndhurst.*—In this case of Knight and the Marquis of Waterford, the bill was filed against the Marquis of Waterford when he was an infant—the Defendant's answer, if he had been of full age, would have been insufficient; but no exception could be taken to the answer for insufficiency on account of his being an infant. After he came of age, the bill in question was filed, which was a supplemental bill for a discovery only; and in that supplemental bill for a discovery, he is interrogated as to the points to which he was interrogated when an infant; and with respect to which interrogatories he made no discovery; he is also interrogated as to two other matters, which form no part of the interrogatories contained in the original bill. The question is, whether this supplemental bill for a discovery can be sustained. A demurrer has been put in to the whole bill: now, whatever the ancient practice might be, it is quite clear that a supplemental bill for a discovery merely may be filed either where new facts have occurred since the commencement of the original suit, or where facts which have existed before, have been discovered at such a period of the original suit, that the party would not have a right to avail himself of them in that original suit. This is permitted for the purpose of preventing a failure of justice. It has, however, been decided, that where the fact did exist before the filing of the original bill, and was known at such a period that the party might have availed himself of it in the original suit, he would not be entitled to file a supplemental bill for a discovery, because he would not have a right to file such a bill for the purpose of supplying an omission arising solely from his

own negligence; the principle, therefore, of the Court seems to be this, that where it is necessary to file a bill for the purpose of obtaining a discovery which could not have been obtained in the original suit, then a supplemental bill for a discovery may be sustained. I think that is the principle to be extracted from this decision, and it is analogous to the rule upon which bills of discovery are allowed to be filed in aid of actions at law, you cannot obtain a discovery in a court of law, and, therefore, for the purpose of preventing a failure of justice, a court of equity allows a bill to be filed for the purpose of obtaining a discovery which is to aid the party in his suit at law.

Now, what are the facts of this case? The original bill was filed, and the answer put in, but no discovery—that is, no effectual discovery—was or could be obtained under such circumstances. Following the principle upon which bills for discovery are founded for the purpose of preventing a failure of justice, and of providing a remedy for the defects of the original proceeding, the party should have a right to file a bill for a discovery, where that discovery has been imperfect in the original suit, in consequence of the infant not having made a full answer, by his guardian; as far, therefore, as relates to those interrogatories which form part of the original bill, and which were not answered by the Defendant in the original bill, the supplemental bill for a discovery must be sustained. But then there are certain other facts inserted in this supplemental bill, which form no part of the original bill; and it is not averred that these facts did not exist, or that they were not known by the Plaintiff when the original suit was instituted for any thing that appears to the contrary, therefore they might have formed a part of the original bill, and if they had formed a part of the original bill, they might have been answered, and fully answered, by the Defendant, the infant. But then this is a demurrer to the whole bill; and though, if these interrogatories had been the only part of the supplemental bill for a discovery, the demurrer might, possibly, have been sustained on the ground that the party had no right, in consequence of his own negligence, to file a bill of this description, yet as it is a demurrer to the whole bill, and I am of opinion that a part of it ought to be answered, it follows that the demurrer must be overruled.

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## ENGLAND.

(COURT OF CHANCERY.)

THOMAS FOSTER, GEORGE CLEEVE, } *Appellants;*  
and JAMES BAIKIE - - - }

Sir CHARLES COCKERELL, Bart. - *Respondent.*

M., by deeds executed in 1812, conveyed lands to trustees in fee, upon trust, to raise money by sale or mortgage to pay off the debts of B., and to pay the surplus of monies raised in M.'s lifetime to him, and of monies raised after his death to B., and to stand seised of the estates unsold in trust for M., during his life, and after his decease in trust for B. in fee. By deeds executed in 1813, B. granted annuities to the Appellants, and by deeds of the same date, and to secure the annuities, gave powers of distress and entry upon the lands comprised in the deeds of 1812, and demised the lands to trustees for a term. The annuities were also further secured by warrants of attorney, and judgments thereon, and memorials of them were enrolled.

By deeds executed in 1814, B. conveyed to the Respondent all the monies and premises to which he was entitled under the deeds of 1812, to secure the replacing of 20,000*l.* navy 5 per cents. lent to B. by the Respondents.

M. died in 1817. Part of the lands were sold in the lifetime of M.; the residue were sold after his death, and a surplus remained after execution of the trusts.

In 1819 the Respondent gave notice of his incumbrance to the surviving trustee. Upon a suit in equity it was decreed that by the effect of the notice the Respondent had gained a priority of charge upon the fund.

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THIS was an appeal from an order of the Master of the Rolls, dated the 5th of March 1835.

By indentures of the 21st and 22d of February,

1812, George Duke of Marlborough, conveyed lands, &c. in Berks, Bucks, Wilts, and Herts, to James Blackstone and Thomas Coutts, in fee, upon trust to raise money, to pay off annuities granted by the Marquis of Blandford, and also, if the trustees thought proper, to pay the debts of the marquis. For which purposes the trustees had power to sell the lands, &c., or in the mean time to mortgage them, and, by means of the proceeds, to re-purchase the annuities, and if the trustees should think proper, but not otherwise, to pay the debts of the marquis, and to pay the ultimate surplus of the money, raised in the lifetime of the duke, to him, and the surplus of the money raised after the duke's death, to the marquis; and the trustees were to stand seised of the estates unsold, in trust for the duke for life, and, after his decease, in trust for the marquis in fee.

The trustees, under the powers of this deed, raised 15,000*l.* upon mortgage of estates in Hertford.

By indenture of the 13th of August, 1812, the trusts were enlarged. The trustees were thereby empowered to raise money to pay interest of debts, and premiums of insurance: they were also authorised to raise money upon annuities, and subject to such trusts, they were to pay the surplus of monies, raised in the lifetime of the duke, to him, and the surplus of monies raised after his decease, to the marquis, and to stand seised of estates unsold, for the duke for life; and after his decease, in trust for the marquis in fee. And the deed contained a declaration, that the trustees might exercise, partially or wholly, the trusts for paying the debts of the marquis. A third deed was executed on the 20th October, 1813.

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Under the powers given to them by the three several indentures above stated, the trustees James Blackstone and Thomas Coutts, from time to time raised various sums of money by way of mortgage, and by granting annuities, and executed various deeds for securing the sums so raised, to the persons who advanced them, and amongst others, they, in the month of February, 1814, made and executed certain indentures of lease and release, dated respectively the 12th and 14th days of that month, whereby they conveyed and assured to Sir William Paxton and Archibald Paxton, both since deceased, and to the Respondent and Henry Trail Esq., such of the manors and other hereditaments, comprised in the said indenture of release of the 22d of February, 1812, as were situate in the counties of Berks and Hertfordshire, by way of mortgage, for securing to them, and the survivors of them, the sum of 45,000*l.* and interest.

In further performance of the trusts reposed in them by the several indentures of the 22d of February, 1812, the 13th of August, 1812, and the 20th of October, 1813, the trustees, Thomas Coutts and James Blackstone, sold, or contracted and agreed to sell, all such of the estates comprised in the indenture of release of the 22d of February, 1812, as were situate in the several counties of Buckingham, Hertford, and Wilts, and divers parts of the purchase monies of those estates were received, and were paid and applied by them in the lifetime of George Duke of Marlborough in pursuance of the trusts of the three several indentures, of the 22d of February, 1812, the 13th of August, 1812, and the 20th of October, 1813 : other parts of such purchase monies, were re-

ceived in the lifetime of George Duke of Marlborough, by the same trustees, and remained in their hands at his death, and other parts of the purchase monies were, at the time of the death of George Duke of Marlborough outstanding, and remaining due from some of the purchasers.

George Duke of Marlborough died on the 30th of January, 1817.

Thomas Coutts died in the month of February, 1822.

In Michaelmas term, 1824, the Appellants, Thomas Foster and George Cleeve, together with William Walter, who is since dead, filed their bill of complaint in the high Court of Chancery, which was afterwards amended in pursuance of an order obtained for that purpose; and the bill so amended was against James Blackstone, Harriett Coutts widow, now Harriett Duchess of St. Alban's, Sir Coutts Trotter, baronet, Edward Majoribanks, Sir Edmund Antrobus, baronet, the Respondent Sir Charles Cockerell, baronet, John Pinniger, Joseph White, Charles Richardson, Thomas Wright, John Wright, Philip Luke Godsal, Charles Hatchett, Henry Trail; and against the said Marquis of Blandford, who, by the death of George Duke of Marlborough, had then become Duke of Marlborough, as defendants thereto, whereby, after stating, amongst other things, the indentures of lease and release of the 21st and 22d of February, 1812, and the indenture of the 13th of August, 1812, the Plaintiffs in the bill alleged:—

“ That in the month of June, 1813, the Appellant Thomas Foster, agreed with the said Marquis of Blandford, for the purchase of an annuity

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“ of 447*l.* during the life of the Appellant Thomas  
 “ Foster, and the lives of George Carroll of Oxford  
 “ Street, lottery office keeper, John Coventry of  
 “ the town of Bedford, and John Brown of Brompton  
 “ Crescent, in the county of Middlesex, and  
 “ the life and lives of the survivors and survivor  
 “ of them, at or for the price or sum of 3,576*l.*  
 “ to be secured in the manner thereafter mentioned;  
 “ and that in pursuance of the said agreement,  
 “ an indenture, bearing date the 8th of June, 1813,  
 “ was duly made between the said Marquis of Blandford  
 “ of the first part, the said Appellant Thomas Foster  
 “ of the second part, and nine other persons therein  
 “ respectively named and described of the third part,  
 “ and which was executed by the said Marquis of Blandford,  
 “ and the said Appellant Thomas Foster, whereby it was  
 “ witnessed, that in consideration of the sum of 3,576*l.*  
 “ paid to the said Marquis of Blandford by the said  
 “ Appellant Thomas Foster, the said Marquis of Blandford  
 “ granted unto the said Appellant Thomas Foster an  
 “ annuity of 447*l.*, to hold the same unto said Appellant  
 “ Thomas Foster, his executors, administrators, and assigns  
 “ thenceforth, during the natural life of the said Appellant  
 “ Thomas Foster, and the said George Carroll, John Coventry,  
 “ and John Brown; and the lives and life of the survivors  
 “ and survivor of them, payable, &c. inclusive of the day  
 “ of such survivor’s decease; and that the said indenture  
 “ contained a clause, authorising the said Marquis of  
 “ Blandford to repurchase the said annuity thereby granted,  
 “ on payment to the said Appellant Thomas Foster, his  
 “ executors, admin-

“istrators, or assigns, of the sum of 3,687*l.* 1*s.*,  
 “and all arrears of the said annuity, up to the  
 “time of re-purchasing the same.

“That in pursuance of an agreement (recited)  
 “an indenture, bearing date the 12th of June,  
 “1813, was made between the said Marquis of  
 “Blandford of the first part, the Appellant George  
 “Cleeve of the second part, and seventeen other  
 “persons therein particularly named and de-  
 “scribed of the third part; and which was duly  
 “executed by the said Marquis of Blandford and  
 “the said Appellant George Cleeve, whereby, in  
 “consideration of the sum of 6000*l.* therein ex-  
 “pressed, to be paid by the said Appellant George  
 “Cleeve to the said Marquis of Blandford, the  
 “said Marquis of Blandford granted unto the Ap-  
 “pellant George Cleeve an annuity of 750*l.* dur-  
 “ing the lives of the said George Carroll, James  
 “Gibbs, John Stalker, and Benjamin Gibbs, and  
 “the lives and life of the survivors and sur-  
 “vivor of them, payable quarterly, &c.

“That in pursuance of an agreement (recited) an  
 “indenture bearing date the 14th of June, 1813, was  
 “made by and between the said Marquis of Bland-  
 “ford of the first part, and the said William Walter  
 “of the second part, and thirty-six other persons  
 “therein respectively named and described of the  
 “third part, and which was duly executed by the  
 “said Marquis of Blandford, and the said Wil-  
 “liam Walter deceased, whereby the said Marquis  
 “of Blandford, in consideration of the sum of  
 “6200*l.* therein expressed to be paid to him by  
 “the said William Walter deceased, granted unto  
 “the said William Walter deceased an annuity of  
 “775*l.*, to hold unto the said William Walter, his

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“ executors, administrators, and assigns, during the  
“ lives of the said Harriett Elizabeth Berry,  
“ Thomas Berry, James Henry Mann, and Thomas  
“ Allason, and the lives and life of the survivors and  
“ survivor of them, &c.

“ That, at the time, when the said Appellants  
“ Thomas Foster and George Cleeve, and the said  
“ William Walter deceased respectively agreed to  
“ purchase the said three several annuities, it was  
“ further agreed by and between them and the said  
“ Marquis of Blandford that the said three annui-  
“ ties respectively should be further secured by and  
“ out of the said estates and hereditaments com-  
“ prised in the said indenture of release of the 22d  
“ of February, 1812; and that, in pursuance of the  
“ said agreement, an indenture bearing date the  
“ 14th day of June, 1813, was made between the  
“ said Marquis of Blandford of the first part, the  
“ said Appellant Thomas Foster of the second part,  
“ the said Appellant George Cleeve of the third  
“ part, the said William Walter deceased of the  
“ fourth part, and Edward Howard, therein de-  
“ scribed, of the fifth part, and which was duly ex-  
“ ecuted by all the parties; whereby, after reciting  
“ amongst other things the said indenture of lease  
“ and release of the 21st and 22d days of February,  
“ 1812, and the said indenture of the 13th day of  
“ August, 1812, thereunder written, and reciting  
“ the said indenture of the 8th of June, 1813, being  
“ the grant of the said annuity of 447*l.* to the said  
“ Appellant Thomas Foster, and the said inden-  
“ ture of the 12th of June, 1813, being the grant  
“ of the said annuity of 750*l.* to the said Appellant  
“ George Cleeve, and the said indenture of even  
“ date with the indenture now being stated, being

“ the grant of the said annuity of 775*l.* to the said  
 “ William Walter deceased : and also reciting, that  
 “ upon the several treaties for the purchase of the  
 “ said several annuities of 447*l.*, 750*l.*, and 775*l.* it  
 “ had been agreed that, for further securing the  
 “ payment thereof, the said Appellants Thomas  
 “ Foster and George Cleeve, and the said William  
 “ Walter deceased respectively, and their respect-  
 “ ive executors, administrators, and assigns should,  
 “ from and after the decease of George Duke of  
 “ Marlborough deceased, have powers of distress and  
 “ entry into, over, and upon, and of perception of,  
 “ the rents and profits of the said manors, mes-  
 “ suages, lands, tenements, tithes, and heredita-  
 “ ments comprised in the therein-before recited  
 “ indentures of lease and release of the 21st and 22d  
 “ of February, 1812; and that the said Marquis  
 “ of Blandford had also agreed to demise the same  
 “ hereditaments for a term of years, for better se-  
 “ curing the said three annuities to the said Ap-  
 “ pellants Thomas Foster, George Cleeve, and the  
 “ said William Walter deceased respectively : It  
 “ was witnessed, that in pursuance and part per-  
 “ formance of the said recited agreements, the  
 “ said Marquis of Blandford thereby granted unto  
 “ the said Appellants Thomas Foster, George  
 “ Cleeve, and the said William Walter respectively,  
 “ their respective executors, administrators, and  
 “ assigns, that from time to time, from and after  
 “ the decease of George Duke of Marlborough de-  
 “ ceased, and when and as often it should happen,  
 “ that the said annuities or yearly sums of 447*l.*,  
 “ 750*l.*, and 775*l.* respectively, or any quarterly pay-  
 “ ment of the same annuities respectively should be

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“in arrear and unpaid in the whole or in part by  
“the space of twenty-one days next over or after  
“any of the days or times whereon the same were  
“respectively appointed to be paid as aforesaid,  
“then and so often and from time to time it should  
“and might be lawful for the said Appellants  
“Thomas Foster, George Cleeve, and the said  
“William Walter deceased respectively, their re-  
“spective executors, administrators, and assigns,  
“into and upon the said manors, messuages, lands,  
“tenements, tithes, and hereditaments therein-  
“after granted and demised, or into and upon any  
“part thereof to enter, and distrain for the same  
“annuities or yearly sums of 447*l.*, 750*l.*, and 775*l.*  
“and all the arrears thereof respectively, and the  
“distress and distresses then and there found to  
“detain, manage, sell, and dispose of in the same  
“manner in all respects, and upon the same terms  
“as distresses for rents reserved upon leases for  
“years might be, and were, and ought to be detain-  
“ed, managed, sold, and disposed of, and as if the  
“said annuities or yearly sums of 447*l.*, 750*l.*, and  
“775*l.*, were rents reserved upon leases for years ;  
“to the intent that the said Appellants Thomas  
“Foster, George Cleeve, and the said William  
“Walter respectively, their respective execu-  
“tors, administrators, and assigns, should there-  
“with, thereby, or otherwise be fully satisfied and  
“paid the said annuities or yearly sums of 447*l.*,  
“750*l.*, and 775*l.*, and all the arrears thereof, and  
“costs, charges, and expenses to be occasioned by  
“nonpayment thereof, at the days or times so as  
“aforesaid appointed for the payment of the same,  
“and thereinbefore mentioned ; and the said Mar-

" quis of Blandford thereby further granted unto  
 " the said Appellants Thomas Foster, George  
 " Cleeve, and to the said William Walter deceased  
 " respectively, and their respective executors, ad-  
 " ministrators, and assigns, that from time to time  
 " from and after the decease of George Duke of  
 " Marlborough deceased, and when and as often as  
 " it should happen that the said annuities or yearly  
 " sums of 447*l.*, 750*l.*, and 775*l.*, respectively, or  
 " any part of the same annuities, should be in ar-  
 " rear and unpaid by the space of thirty-one days  
 " next over or after any or either of the said days  
 " whereon the same annuities were by the said in-  
 " dentures respectively appointed to be paid as  
 " aforesaid, then and so often and from time to  
 " time, either upon or at any time after the expir-  
 " ation of the said thirty-one days, it should and  
 " might be lawful to and for the said Appel-  
 " lants Thomas Foster and George Cleeve, and  
 " the said William Walter respectively, their  
 " respective executors, administrators, and assigns,  
 " although no formal or legal demand should  
 " have been made of the said annuities or  
 " yearly sums of 447*l.*, 750*l.*, and 775*l.*, into  
 " and upon the said manors, lands, tenements,  
 " tithes, and hereditaments, in the name of the  
 " whole, to enter, and the same to have, hold,  
 " and enjoy, and the rents and profits thereof,  
 " and of every part thereof, to receive and take  
 " to and for their own use and benefit, until  
 " they respectively should thereby, therewith, or  
 " otherwise be fully satisfied and paid the said  
 " annuities or yearly sums of 447*l.*, 750*l.*, and  
 " 775*l.*, and all the arrears thereof, and so much of

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“ the said same annuities or yearly sums of 447*l*,  
“ 750*l*, and 775*l* as should from time to time  
“ accrue and grow due and owing, during such  
“ time as the said Appellants Thomas Foster and  
“ George Cleeve, and the said William Walter  
“ deceased respectively, their respective execu-  
“ tors, administrators, and assigns, should conti-  
“ nue or be in possession of the premises, after  
“ every such entry as aforesaid, and also all such  
“ losses and damages and expenses as should be  
“ occasioned by the nonpayment of the said an-  
“ nuities or yearly sums of 447*l*, 750*l*, and 775*l*  
“ or any part thereof respectively, at the days  
“ and times aforesaid; and such possession,  
“ when taken, to be without impeachment of  
“ waste; and it was further witnessed, that in  
“ pursuance and part performance of the said  
“ recited agreement, and for the considerations  
“ therein mentioned, he, the said Marquis of  
“ Blandford, by the direction and on the nomin-  
“ ation and appointment of the said Appellants  
“ Thomas Foster and George Cleeve, and the  
“ said William Walter deceased respectively,  
“ granted and demised all the said manors, mes-  
“ suages, lands, tenements, and hereditaments  
“ comprised in the said indentures of lease and  
“ release of the 21st and 22d days of February,  
“ 1812, with the appurtenances, unto the said  
“ Edward Howard as a trustee, for the term of  
“ 500 years, in remainder expectant on the de-  
“ cease of George Duke of Marlborough deceased,  
“ upon the trusts therein mentioned, for better  
“ securing the said three annuities to the said  
“ Appellants Thomas Foster and George Cleeve,

“and the said William Walter deceased respectively, but subject to the subsisting trusts declared of and concerning the same manors and hereditaments by the thereinbefore recited indenture of release of the 22d of February, 1812, and by the said indenture of the 13th of August, 1812, and also subject as thereinbefore was mentioned.”

“The bill prayed, that an account might be taken, by or under the direction of the Honourable Court, of all and singular the said estates and hereditaments comprised in the said indenture of lease and release of the 21st and 22d days of February, 1812, and of the rents, profits, purchase money, and produce thereof received by the said James Blackstone deceased, and by the said Thomas Coutts deceased, in the lifetime of the said Thomas Coutts, and since his death by the said James Blackstone, or either of them, or any person or persons by their or either of their order, or for their or either of their use, or which, without their or either of their wilful neglect or default, they or either of them might have received; and that an account might be taken of the sums of money paid and expended by the said James Blackstone and the said Thomas Coutts, in the lifetime of the said Thomas Coutts, and since his decease by the said James Blackstone, under and by virtue of trusts of the said indenture of release; and that an account might be taken of what was due to the said Appellants Thomas Foster and George Cleeve, and to the said William

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“ Walter deceased respectively, for or in respect  
 “ of the arrears of the said respective annuities  
 “ granted and secured by the said indentures of the  
 “ 8th day of June, 1813, the 12th day of June 1813,  
 “ and the 14th day of June, 1813, and that  
 “ the amount of such arrears might be paid  
 “ to the said Appellants Thomas Foster and  
 “ George Cleeve, and to the said William Wal-  
 “ ter deceased, respectively, out of the monies  
 “ which, upon the taking of the said account  
 “ should be found due from the said James Black-  
 “ stone and Thomas Coutts, and that a sufficient  
 “ part of such trust monies might be set apart and  
 “ invested to secure or meet the future payments  
 “ of the same annuities respectively; and if the  
 “ said Harriett Duchess of St. Alban’s, Sir Coutts  
 “ Trotter, Edward Majoribanks, and Sir Edmund  
 “ Antrobus, the executrix and executors of the  
 “ said Thomas Coutts, should not admit assets  
 “ of the said Thomas Coutts deceased, come to  
 “ their hands, sufficient to answer what might  
 “ be due to the said Appellants Thomas Foster  
 “ and George Cleeve, and to the said William  
 “ Walter respectively, from his estate, in respect  
 “ of the matters aforesaid, then that the usual  
 “ accounts might be taken by or under the di-  
 “ rection of this Honourable Court, of all and  
 “ singular the personal estate and effects of the  
 “ said Thomas Coutts, come to the hands of the  
 “ said executrix and executors respectively, or  
 “ any of them, or to the hands of any per-  
 “ son or persons, by their order or for their  
 “ use respectively, and of his funeral and testa-  
 “ mentary expenses and debts, and that the same

“might be paid in a course of administration, and  
 “that all such further and other accounts might  
 “be taken and directions given as might be ne-  
 “cessary ; and for general relief.”

The several Defendants to the amended bill, having been served with process, appeared and put in their respective answers thereto. The Respondent, by his answer, stated the following case.

In the month of November, 1814, the Respondent, at the request of the Marquis of Blandford, sold out a sum of 20,000*l.* navy five per cent. annuities, and lent the proceeds thereof, amounting to the sum of 19,173*l.* 16*s.* to the Marquis of Blandford ; and thereupon an indenture, bearing date the 10th day of November, 1814, was made and executed, by and between the Marquis of Blandford of the one part, and the Respondent of the other part, whereby, after reciting the indentures of lease and release of the 21st and 22d days of February, 1812, the Marquis of Blandford granted and assigned unto the Respondent, his heirs and assigns, all the manors, messuages, tithes, hereditaments, monies, and premises, to which he the Marquis of Blandford was then entitled, under the trusts of the indenture of the 22d of February 1812, and all his estate and interest therein, subject to redemption upon re-transfer of the sum of 20,000*l.* navy five per cent. annuities into the name or names of the Respondent, his executors, administrators, or assigns, at the time therein mentioned, and long since passed, and upon payment in the meantime to the Respondent, his executors, administrators, or assigns, on the days on which

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the dividends of the navy five per cent. annuities were payable at the Bank of England, of so much money as should be equal to the dividends on the sum of 20,000*l.* of that stock: by the same deed, the Marquis of Blandford constituted and appointed the Respondent, his executors, administrators, and assigns, his true and lawful attorney and attornies, to ask, demand, and receive the monies thereby assigned; and he also covenanted and agreed, for himself, his heirs, executors, and administrators, with the Respondent, his executors, administrators, and assigns, that he the Marquis of Blandford, his heirs, executors, administrators, or assigns, would transfer into the name of the Respondent, his executors, administrators, or assigns, the sum of 20,000*l.* navy five per cent. annuities, at the time thereinbefore mentioned and appointed for the transfer of the same, and would in the mean time, on the respective days on which the dividends on the navy five per cent. annuities were payable to the public at the Bank of England, pay or cause to be paid to the Respondent, his executors, administrators, or assigns, so much money as should be equal to the dividends on 20,000*l.* of that stock. In the month of March, 1819, the Respondent caused notice in writing to be given to Thomas Coutts and James Blackstone, of the indenture of the 10th of November, 1814, and of the Respondent's claims and title under the same.

The answer also denied all knowledge, information, &c., as to the granting of the annuities granted by the Marquis of Blandford, to the Plaintiffs, and the agreements, deeds, &c., the

securities by which the same were granted and secured.

The cause being at issue, witnesses were examined on the part of the Appellants Thomas Foster and George Cleeve, and of William Walter, but before any further proceedings were had therein, William Walter died, having by his will appointed the Appellant James Baikie and certain other persons the executors thereof. The Appellant James Baikie alone proved the will in the Prerogative Court of the Archbishop of Canterbury.

The Appellants thereupon exhibited their bill of revivor in the High Court of Chancery against the above-named Defendants, and the suit and proceedings were revived by an order of the court dated the 12th of June, 1827.

The cause was heard before the Master of the Rolls on the 18th of February, 1830. By the decree of that date, it was ordered and decreed, that it should be referred to the Master in rotation to take an account of what was due to the Appellants respectively for and in respect of the respective annuities in the pleadings mentioned, granted, and secured by the indentures bearing date the 8th day of June, 1813, the 12th day of June, 1813, and the 14th day of June, 1813; and that it should be referred to the said Master to take an account of the estates and hereditaments comprised in the said indentures of lease and release of the 21st and 22d days of February, 1812, and the said 14th day of June, 1813; and of the rent and profits thereof, and the produce

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of the sales thereof, received by the said James Blackstone, and by Thomas Coutts deceased, in the life of the said Thomas Coutts, or by the said James Blackstone, since his decease, or either of them; or by any other person or persons by their or either of their order, or for their or either of their use; and that what, upon the taking of the said accounts, should appear to have come to the hands of the said James Blackstone, should be answered by him; and that what, upon the taking the said account, should appear to have come to the hands of the said Thomas Coutts, in his lifetime, should be answerable by the said Defendants William Duke of St. Alban's, and Harriett Duchess of St. Alban's, his wife, Sir Coutts Trotter, Edward Majoribanks, and Sir Edmund Antrobus, the executors of the said Thomas Coutts, out of the assets, they by their answers admitting assets; and that it should be referred to the said Master to take an account of what was due for principal money on the said several respective charges and incumbrances on the estates and premises comprised in the said indentures of the 21st and 22d days of February, 1812, and the 14th day of June, 1813; distinguishing what was due on each respective charge and incumbrance, and to compute interest according to the rate such charges and incumbrances bore interest. And on taking such accounts, and in computing such interest, his Honor did order that the said Master should state by whom and to what time the interest had been paid: and the said Master was to inquire and state to the Court the dates

of the several and respective charges and incumbrances, and the sums for which the same were given, and the particular premises comprised therein, and their respective priorities with regard to each other; and in case the said Master should find that any of such charges and incumbrances comprised any other estate and effects than the said trust estates, then that the said Master should take an account of the same and of the sums received by such incumbrancers under the same; and the said Master was to be at liberty to state any special circumstances, as he should think fit; and it was ordered, that it should be referred to the said Master to tax all parties their costs of the said suit, the costs of the said James Blackstone, the said William Duke of St. Alban's and Harriett Duchess of St. Alban's his wife, Sir Coutts Trotter, Edward Majoribanks, and Sir Edmund Antrobus, baronet, as between solicitor and client, and his Honor reserved the payment thereof, and also reserved the consideration of all further directions, and of subsequent costs, until after the Master should have made his report.

James Blackstone, and the executors of Thomas Coutts respectively, preferred petitions of appeal to the Lord Chancellor against so much of the above mentioned decree as ordered, "that it should be referred to the said Master to take an account of the rents and profits, of the said estates and hereditaments, comprised in the said indentures of the 21st and 22d days of February, 1812, and the 14th day of June, 1813, received by the said James Blackstone and the said Thomas

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" Coutts deceased, in the lifetime of the said  
" Thomas Coutts, or by the said James Black-  
" stone since his decease, or either of them, or by  
" any other person or persons by their or either  
" of their order, or for their or either of their  
" use."

James Blackstone afterwards died intestate, as to the trust estates vested in him, and the suit was duly revived against William Seymour Blackstone, his heir at law and legal personal representative.

The petitions of appeal were heard before the Lord Chancellor on the 12th of July, 1831, when it was ordered, that the decree, dated the 18th of February, 1830, should be reversed as to the directions appealed from, and instead thereof his Lordship ordered that it should be referred to the Master to take an account of the rents and profits of the estates, and hereditaments, comprised in the indentures of lease and release of the 21st and 22d of February, 1812, and the 14th day of June, 1818, received by James Blackstone, or by any other person or persons by his order, or for his use, since the filing of the original bill in the cause; and that what upon the said account, should appear to have come to the hands of the said James Blackstone, should be answered out of his assets by William Seymour Blackstone, his executor.

The Master to whom the cause was referred made his general report therein, dated the 24th of December, 1832, and thereby, after stating the several deeds hereinbefore stated, and stating the notice given by the Respondent to James Blackstone and Thomas Coutts, of the indenture of the

10th of November, 1814, and the affidavits in proof of the service thereof, and stating such other matters as in his report are stated; he found that the estates comprised in the indenture of release of the 22d of February, 1812, consisted of several manors, farms, messuages, lands, and hereditaments in the several counties of Berks, Bucks, Wiltshire, and Hertfordshire; and he found that such of the said lands and hereditaments, as were situate in the county of Berkshire, and which were known by the name of the White Knight's estate, were recovered in an action of formedon by Francis Cholmeley, who claimed the same by a title prior and adverse to that of George Duke of Marlborough deceased, and those claiming under him, and that the said Francis Cholmeley, was then in the possession thereof, by virtue of the judgment obtained by him in that action; and the Master also found that the lands and hereditaments in the counties of Buckinghamshire, Wiltshire, and Hertfordshire, had been sold by the trustees James Blackstone and Thomas Coutts, and that the produce of the sale of such of the estates, as were situate in the county of Buckingham was in part received by James Blackstone and Thomas Coutts, and applied by them in the lifetime of George Duke of Marlborough deceased, in satisfaction and discharge of incumbrances upon the same estates, and that the residue was also received by them, or the survivor of them, and that certain parts thereof had been applied in discharge of further charges upon the same estates, and that other parts thereof were invested in the purchase of exchequer bills to the amount of 6000*l*, and

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that the residue thereof had been expended in various payments on account of the trusts; and the Master also found that the produce of the sale of such of the estates as were situate in the county of Wilts, were received subsequently to the death of George Duke of Marlborough deceased, by James Blackstone and Thomas Coutts, and by James Blackstone, after the death of Thomas Coutts, together with the accumulation thereof; and that certain parts thereof, were invested in the purchase of exchequer bills to the amount of 24,500*l.*, and that two several sums of 381*l.* 11*s.* 8*d.* and 1468*l.* 15*s.* 5*d.* further parts thereof, were afterwards paid into the bank to the credit of the cause, and that the residue thereof had been expended in various payments on account of the trusts; and the Master also found that the produce of the sale of such of the estates as were situate in the county of Herts, was in part only received by James Blackstone and Thomas Coutts, and the survivor of them, and was wholly applied in payment of the mortgages and other charges subsisting upon the same estates; and the Master also found that in pursuance of an order made in the above mentioned cause, dated the 31st of May 1825, the aforesaid sums of 6000*l.* exchequer bills, purchased with part of the produce of the estates in the county of Bucks, and the sum of 24,500*l.* in exchequer bills purchased with part of the produce of the estates in the county of Wilts, were deposited with the accountant-general of the High Court of chancery, in trust in the above mentioned cause, and were sold by him, and that the produce thereof, toge-

ther with the aforesaid sum of 381*l.* 11*s.* 8*d.*, was laid out in the purchase of bank three per cent. annuities, and placed to the credit of the above mentioned cause; and the Master also found that in pursuance of another order made in the above mentioned cause, dated the 14th of November, 1827, the aforesaid sum of 1468*l.* 15*s.* 5*d.* other part of the produce of the estates in the county of Wilts, was also paid into the bank to the credit of the above mentioned cause, and laid out by the accountant-general in the purchase of three per cent. annuities, and placed to the credit of the above mentioned cause; and he found that there was then standing in the name of the accountant-general, in trust of the above mentioned cause, the sum of 47,508*l.* 12*s.* 1*d.* bank three per cent. annuities, the whole of which had arisen from the produce of the sale of the estates in the counties of Bucks and Wiltshire, and from the accumulations of interest on such produce; and the Master also found, that there was due to the Appellant Thomas Foster, for the arrears of the annuity of 447*l.*, granted to him the sum of 7023*l.*, and that there was due to the Appellant George Cleeve, for the arrears of the annuity of 750*l.*, granted to him the sum of 11,812*l.* 10*s.*, and that there was due to the Appellant James Baikie, as executor of William Walter deceased, for the arrears of the annuity of 775*l.*, granted to the same William Walter deceased the sum of 12,206*l.* 5*s.*; and the Master further found that there was due to the Respondent under the indenture of the 10th of November, 1814, the sum of 17,700*l.* 3½ per cent. bank annuities, together

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with the sum of £797*l.* 16*s.* 3*d.* cash, in respect of the dividends thereof up to the 5th of July, 1832; and the Master further found that the Appellants, in respect of their three several annuities, were the first incumbrancers upon the estates in the counties of Bucks and Wiltshire, and the second incumbrancers upon the estates in Berkshire and Hertfordshire, as comprised in the indentures of the 21st and 22d of February, 1812, and that the Respondent in respect of the indenture of the 10th of November, 1814, was the second incumbrancer upon the said estates in the counties of Bucks and Wilts, and the third incumbrancer upon the said estates in the counties of Berks and Herts.

The Respondent filed an exception to the above report, and excepted thereto for that the Master had found and certified, that the Appellants were the first incumbrancers upon the estate in the counties of Bucks and Wilts in the above report mentioned; and that they were the second incumbrancers upon the estates in the counties of Berkshire and Herts in the above report mentioned in respect of the three several annuities in the above report mentioned; and that the Respondent was the second incumbrancer upon the said estates in the counties of Bucks and Wiltshire, and the third incumbrancer upon the said estates in the counties of Berkshire and Hertfordshire, in respect of the indenture of the 10th of November, 1814: and the Respondent by his exception insisted that the Master ought to have found, and certified that the Respondent was, in respect of the indenture of the 10th of November, 1814, the first incumbrancer upon the said

estates in the counties of Buckinghamshire and Wiltshire, and the second incumbrancer upon the said estates in the counties of Berks and Herts; and that the Appellants were the second incumbrancers upon the said estates in the counties of Bucks and Wilts, and the third incumbrancers upon the said estates in the counties of Berks and Herts.

The exception having been argued on the 5th of March, 1833, was allowed; and upon further directions, an order was made, declaring the priority of the Respondent's security, and directing accounts and payment accordingly.

The appeal was from so much of this order as directed that the exception should be allowed, &c.; and as declared that the Respondent, under the indenture of the 10th of November, 1814, was the first incumbrancer on, &c., in respect of the stock and dividends secured to him by that indenture; and as ordered that what the Master should certify to be the value of the sum of 17,700*l.*, 3½ per cent. bank annuities, reported due to the Respondent upon his said security, according to the current price, &c., on the day of the report, &c., and the amount due to the Respondent in respect of dividends, &c., should be paid to the Respondent out of the monies to arise by the sale of the said bank 3 per cent. annuities, prior to the payment of the sums found and reported due to the Appellants for the arrears of their three several annuities.

For the Appellants, *Mr. Treslove* and *Mr. Tinney*.

The contending parties have equitable interests only. The security of the Appellants bears date in June, 1813, and that of the Respondent in November, 1814. Neither of them, prior to their

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securities, made any inquiry of the trustees as to existing incumbrances, or had any communication with them, but each trusted to his security. There was a good reason for the omission, as, from the nature of the trust deeds, the trustees might have sold the estates, and defeated the security, by paying the produce to the then Duke of Marlborough. After the duke's death, in January, 1817, the present duke took a permanent interest in the estates and the produce of them; and a part of the estates having been sold, the Respondent, in March, 1819, gave the trustees notice of his security, for the purpose of obtaining payment; and in May, 1823, the Appellants gave the trustees notice of their security for the same purpose.

The decision at the Rolls, that the Respondent, by means of his notice, acquired a better equity than the Appellants and a priority to them, is, it is apprehended, perfectly new, and founded in no principle of justice, which prescribes that equitable incumbrances shall be paid according to their priorities, according to the well known rule, *Qui prior est tempore potior est jure*. Equitable incumbrances derive their effect from the payment of the consideration, which in equity converts the trustee of the legal estate or fund into a trustee for the incumbrancer. Notice of the incumbrance to the trustee neither makes the equity better or worse: it merely apprises him that a duty is cast upon him for the benefit of the incumbrancer; but until that duty be discharged, it cannot justly interfere with the prior rights of others.

The Master of the Rolls has destroyed the equity of the first incumbrancer, because the second incumbrancer, by his notice, protected himself against a future incumbrance, if there ever should be one.

His Honour said, "A better equity is, where a second incumbrancer, without notice (meaning notice of a prior incumbrance), takes a protection against a subsequent incumbrancer, which the prior incumbrancer has neglected to take; thus a declaration of trust of an outstanding term, accompanied by delivery of the deeds creating and continuing the term, gives a better equity than a mere declaration of trust to a prior incumbrancer." His Honour here alluded to the case of *Stanhope v. Earl Verney*\*, which was cited by the Respondent's counsel.

The case referred to involves a branch of the general doctrine of equity, that where there are several equitable incumbrancers on land, who have advanced their money and taken their securities without notice of any prior incumbrance, any one of them may exclude the prior incumbrancers by getting in an outstanding legal estate, generally an old term of years, by means of which he can recover the possession of the land at law. In *Brace v. Duchess of Marlborough*, 2 P. Wms. 491.†, it is laid down, "If a third mortgagee buys in the first mortgage, though it be *pendenté lite* pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgage; and this the Lord Chief Justice Hall called a plank gained by the third mortgagee, or *tabula in naufragio*." This doctrine is perfectly established and familiar; and where a subsequent incumbrancer has not

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\* 2 Eden. 81. See Co. Lit. 290. b., Mr. Butler's Note, 249. See 1 Russ. & M. p. 307.

† Moseley, 50.

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actually obtained a conveyance or an assignment of the outstanding legal estate, he may, by particular acts of diligence in dealing for it, acquire a better right to it than the prior incumbrancer.

The law on this subject is explained by Lord Hardwicke in *Willoughby v. Willoughby*, 1 Term Rep. 763., in which he refers to a case of *Wilker v. Boddington*, 2 Vern. 599., determined by Lord Cowper, who held that the second incumbrancer having taken his conveyance with the privity of the trustees of the legal estate, who were made parties to the deed, acquired a better right to call for the legal estate than his adversary; and the conclusion is, that if a subsequent purchaser or mortgagee has no notice of a prior purchase or mortgage, and has the first and best right to call for an outstanding term, a court of equity will not take it from him; but, in order to have the first and best right, he must possess himself of the deed creating the term; or make the trustee a party to the deed.

This doctrine is also explained and commented upon by Lord Eldon, in *Maundrell v. Maundrell*, 10 Ves. 264., who says, "With regard to mortgagees and incumbrancers, if they do not get in the term in some sense, either by taking an assignment, or making the trustee a party to the instrument, or taking possession of the deed creating the term, that term cannot be used to protect them, or any person having mesne charges and incumbrances."

The review of these cases leads to the better understanding of the application to the present case of *Stanhope v. Earl Verney*, which was referred to by the Master of the Rolls, in illustration of his position that a better equity is, where a second

incumbrancer takes a protection against a subsequent incumbrancer, which the prior incumbrancer has neglected to take. In that case, there being an old outstanding term, Lady Dysart took a mortgage from the owner of the fee simple. The trustees of the term were not parties to the mortgage, and they kept possession of all the deeds. The mortgagor covenanted to produce the deeds. There was no declaration of trust, as the Master of the Rolls seems to intimate, unless the covenant of the mortgagor to produce the deeds be meant. The second mortgage was made to Isabella Nash, who had no notice of Lady Dysart's mortgage. The trustees of the term were not parties to the deed, but the term was stated in the deed, and the mortgagor covenanted that the trustees, Cunningham and Clayton, should stand possessed of the term in trust for Isabella Nash; and Clayton, one of the trustees, who was an attorney, prepared the deed, and attested the execution of it; and Isabella Nash took the deeds, including the deeds creating and continuing the term. Under these circumstances, the second incumbrancer was held to have a better right to the term than the first incumbrancer, and obtained a priority.

This determination was clearly founded on the dealing of the second incumbrancer for the term at the time she took the mortgage, and as part of her security. She had the deeds, and a specific declaration of the trust of the term with the privity of one of the trustees; she had therefore in some sense got in the term, but the first incumbrancer had in no respect dealt with the term, and had in no sense got it in. The second incumbrancer had not only taken an effectual protection against a

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subsequent incumbrancer, but also an effectual protection against all prior incumbrancers, and had thereby acquired a better right to the use of the term by which the estate could be recovered at law; she had law and equity on her side.

How is that case an authority for the decision of the Master of the Rolls? In the present case, there is no struggle for any outstanding estate: neither party could prevent the sale of the estates. Their claims are against a mere *chose in action*, the produce of the sale. Both the incumbrancers dealt for the estate only through the Marquis of Blandford. The securities were not made with the privity or knowledge of the trustees, who had no notice of either of them until upwards of four years after the second security. The equities of the parties are perfectly equal, and the second incumbrancer has obtained no advantage of which the first desires to deprive him. The notice of the Respondent was a protection against a subsequent incumbrancer, but upon what authority or principle of justice could a protection against a subsequent incumbrancer exclude and destroy a prior incumbrance?

The case of *Stanhope v. Earl Verney* does not apply to the subject of a *chose in action* of which there can be no recovery at law. It is also founded on a dealing at the time of taking the incumbrance, with the privity and knowledge of one of the trustees, for an estate, which not only gave a protection against a subsequent incumbrancer, but excluded the prior incumbrancer at law. Looking at the elaborate comments of Lord Hardwicke and Lord Eldon on the doctrine of a subsequent incumbrancer obtaining a priority to a prior incumbrancer, it is impossible to suppose that either of those gr e

judges had any notion that a mere notice to the trustee by a second incumbrancer subsequent to the time of taking his security, could have the effect of ousting the prior incumbrance.

Where, indeed, the assignor of a debt or *chose* in action has become a bankrupt, it is held that the assignment is not valid against the creditors, unless the trustee or party accountable for the debt or *chose in action* has received notice of the assignment prior to the bankruptcy; but this is introduced by statute 21 Jac. 1. c. 19. sect. 11., followed by 6 Geo. 4. c. 16. s. 72., which authorise the commissioners to sell and dispose of all goods and chattels which the bankrupt, by the consent and permission of the owner, should have in his "possession, order, and disposition, whereof he was reputed owner."

This construction of the statute is founded on the case of *Ryall v. Rolle*, 1 Atk. 165., 1 Ves. 348., in which one of two partners in a brewery having made several mortgages of his share in the house, brewhouse, stock in trade, utensils, debts, and future profits, and afterwards become bankrupt, several questions arose as to the validity and priority of the mortgages, for the determination of which Lord Hardwicke called to his assistance Lord Chief Justice Lee, Lord Chief Baron Parker, and Mr. Justice Burnett.

Mr. Justice Burnett has left a report\* of his opinion delivered on that occasion, in his collection of manuscript cases, in Lincoln's Inn library, (lib. 11. fol. 315.,) which is a much more accurate report than is contained in Atkins or Vesey.

From this report it appears, that the debts as-

\* A copy from the MS. is printed at the end of this case.

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signed were not specified sums, which were to be collected and received by the first or subsequent mortgagees, but were the debts accrued and to accrue in the business, and which the mortgagor and his partner were allowed to receive and apply in carrying on the business. The words of the deeds were, "stock in trade, utensils, debts, " and future profits." Mr. Justice Burnett (as appears very distinctly from his own report) and the Chief Justice were of opinion, that as the debts and profits arose from the stock in trade, they ought to follow the nature of the goods and chattels out of which they arose. Lord Hardwicke said, that equity ought to follow the law. The Chief Baron took a wider range, and was of opinion that notice to the debtors was necessary, to take away from the bankrupt the power and disposition of the debts, according to the statute.

This opinion of the Chief Baron has since been followed in all cases of debts and *choses in action* assigned by a bankrupt, where notice of the assignment has not been given to the debtor or trustee prior to the bankruptcy; the necessity of notice is the creature of the bankrupt law, and it required an act of parliament to create it.

But this is confined strictly to goods and chattels. In *Jones v. Gibbons*, 9 Ves. 407., a trader had made an assignment of a debt secured by mortgage of a West India estate, and by the bond of the mortgagor, and having become bankrupt, his assignees filed a bill against the assignee of the debt, to set aside the assignment, insisting on its invalidity for want of notice to the mortgagor, on the authority of *Ryall v. Rolle*. But Sir William Grant held that the debt being secured by mort-

gage, the want of notice could not affect the validity of the assignment.

That case resembles the present. If the estates in question had never been sold by the trustees, but had been conveyed by them to the present Duke of Marlborough, both Appellants and Respondent would have had a real security only for their debts, which the want of notice would not affect, even in bankruptcy; and as that was a security for which the Appellants specifically contracted, there would be ground for contending, even in bankruptcy, that it would not have been defeated for want of notice to the trustees, by the mere conversion of the land into money; but however that may be, and viewing the security as a mere assignment of a *chose in action*, there is no decision or *dictum* that a subsequent assignee can displace a prior assignee by mere notice of the assignment to the trustee.

If this determination at the Rolls is to prevail, it must extend to equitable interests in land as well as to mere *choses in action*. In the case of equitable interests in land, the rule that the priorities are determined by the dates of the securities, has been considered so firmly established, that the Court has refused to allow it to be broken in upon in cases where the subsequent incumbrancer has actually suffered by the concealment of the prior incumbrance, where such concealment was not intended to be fraudulent. Thus, in *Beckett v. Cordley*, 1 Bro. 353., a trust was created by father and son, for sale of a real estate, out of the produce of which 3000*l.* was to be paid to the three younger children. The son bought the estate, and made a mortgage of it, in which the three younger children

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joined, and released the 3000*l.* in consideration of so much of the mortgage money, therein expressed to be paid to them by the mortgagee; but the object being merely to give the mortgagor a priority to the 3000*l.*, the son at the same time signed and gave to the children an agreement in writing, acknowledging that the 3000*l.* was not paid, and agreeing to secure it by mortgage on the estate. He afterwards made a mortgage of the estate to the Plaintiff, who had no notice of the agreement made with the children; and the estate being insufficient for the payment of all the incumbrances, the Plaintiff claimed priority to the children, insisting that as he was misled by their release, they ought to be bound by it as against him. But Lord Thurlow held that there being no fraud, the priority of the children must prevail. He said, "As being prior in time, it must be prior in equity. The mortgagee had the security he trusted to; he knew he had not the legal estate; he trusted to the honour of the borrower." The case was much discussed, and was the subject of a rehearing, in which Lord Thurlow adhered to his opinion. It is of great authority, having been repeatedly referred to with approbation by Lord Eldon, who was counsel for the Plaintiff, particularly in *Ex parte Cawthorne*, 1 Glyn & Jam. 243., *Evans v. Bucknell*, 6 Ves. 192., *Martinez v. Cooper*, 2 Russ. 214.

This doctrine was applied by Lord Thurlow to a *chose* in action, in *Dawes v. Austen*, 1 Ves. 249. He said, "A purchaser of a *chose* in action must always abide by the case of the person from whom he buys. That I take to be a universal rule."

Here may be noticed the doctrine of the Court,

that a first mortgagee does not lose his priority by permitting the mortgagor to have the title deeds, where no fraud is intended, although it enables the mortgagor to commit a fraud on a third person. That appears from the case of *Evans v. Bucknell*, 6 Ves. 174., in which Lord Eldon referred to and repudiated the doctrine, as laid down by Mr. Justice Buller, in *Goodtitle v. Morgan*, 1 Term Rep. 755., who said, "It is an established rule in a court of equity, that a second mortgagee who has the title deeds, without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lends money upon mortgage without taking the title deeds, he enables the mortgagor to commit a fraud." On this, Lord Eldon observed, "I do not wonder that Mr. Justice Buller stated the doctrine as he did, for in *Ryall v. Rolle* it is so stated by Mr. Justice Burnett, without observation by the Lord Chancellor or the other learned persons by whom his Lordship was assisted, as being contrary to the law of this Court."

It is due, however, to the memory of Mr. Justice Burnett to say, that on referring to the manuscript report left by himself of his opinion delivered in that case, it will be found that he did not use the expressions attributed to him in 1 Ves. 360. His own language was, "If these (the deeds), therefore, are permitted to remain in his (the mortgagor's) hands, which ought to have been in the mortgagee's custody, as the means of reducing the land into his own possession, the mortgagee has neglected what was necessary for his own security, and furnished the mortgagor with the means of deceiving the most cautious creditor as

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“ owner of the land. This, therefore, in the case  
“ of *Stone v. Grubham*, is considered as a badge of  
“ fraud ; and Lord Talbot says, the first mortgagee  
“ has contributed to draw in the second, in the  
“ case of *Head v. Egerton*, 3 P. Wms. 280.”

Mr. Justice Burnett had previously said, according to the report in Vesey, that if the title deeds were not left to deceive creditors, but upon reasonable and honest purposes, the leaving of them could not be considered a badge of fraud ; and the case referred to of *Head v. Egerton* did not involve any question of postponing the first mortgagee, but determined that where the first mortgagee had left the title deeds in the hands of the mortgagor, he could not recover them from the second mortgagee, who had taken his mortgage and the deeds without notice of the first mortgage.

A case was determined upon the principle of *Becket v. Cordley* by Chief Baron Richards, *Frere v. Moore*, 8 Price, 475. The equitable owner of a prebendal lease (the legal estate being in a trustee) made a mortgage of it to A. Frere, in which the trustee covenanted to stand possessed in trust for Frere, for securing the mortgage money. He then made a second mortgage to Hudson and Fallows, subject to the mortgage to Frere and afterwards a third mortgage to the Plaintiff, the executor of A. Frere, who had no notice of the mortgage to Hudson and Fallows. In a question of priorities, it was insisted by the Plaintiff, that as Hudson and Fallows had notice of Frere's mortgage, they ought to have given notice to him of their security to prevent his being left to suppose that no incumbrance, except his own, existed, and that as that omission had drawn in the Plaintiff, they

ought to be postponed; but the Chief Baron said, they were not bound to give such notice, and that the incumbrancers must be paid according to their priorities in date.

In the argument of the present case at the Rolls, the Respondent's counsel cited two cases recently determined by Sir Thomas Plumer Master of the Rolls, and by Lord Chancellor Lyndhurst upon appeal. *Dearle v. Hall*, 3 Russ. 1.; and *Loveridge v. Cooper*, 3 Russ. 30. In the former case, a person who was entitled for life to the interest of a sum of money which was laid out in real security in the names of trustees, granted two annuities for his life, out of the interest to the Plaintiffs, and afterwards sold his life interest to the Defendants, who had no notice of the annuities. In the latter case, a legatee of a reversionary sum of stock, expectant on the decease of the testator's widow and standing in the names of trustees, granted an annuity for his life to a person under whom the Plaintiff claimed, and assigned a portion of the reversionary stock for securing it; and shortly afterwards he sold and assigned the whole reversionary stock to a purchaser, who had no notice of the prior assignment. On the death of the widow the Plaintiff filed his bill. But in both these cases, the purchaser's solicitor prior to the purchase, took the precaution of applying to one of the trustees of the fund, and being informed that the trustee knew of no incumbrance, completed his purchase. Under these circumstances, Sir Thomas Plumer was of opinion, that the first incumbrancer, having by his omission to give notice of his incumbrance to the trustee, enabled the assignor to commit a fraud,

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could not come into a court of equity to avail himself of his priority in point of time, in order to defeat the right of the Defendant, who had taken all proper precaution against a prior incumbrance, and he dismissed the bills ; and Lord Lyndhurst, upon appeal, in both cases, in which judgment was given at the same time affirmed the decrees.

It had singularly happened, that Sir Thomas Plumer, in the case of *Cooper v. Fynmore*, 3 Russ. 60., about ten years earlier, had entertained a different opinion, and had established the priority of the first incumbrancer, on the ground that mere neglect of notice was not sufficient to postpone him, and that to deprive him of his priority, it was necessary that there should be such laches, as in a court of equity amounted to fraud. But this case had not been reported, and was not referred to in *Dearle v. Hall* and *Loveridge v. Cooper*, either at the Rolls, or before the Lord Chancellor.

In those two cases, a case before Lord Eldon not then reported, *Wright v. Lord Dorchester*, was cited, in which Mr. Stuart having a life interest in stock standing in the names of trustees, assigned it to the Plaintiff for securing two annuities, and afterwards sold and assigned his life interest to Brown, one of the Defendants, who had no notice of the prior assignment, and who previously to his purchase, was informed by the trustees, on inquiry, that they knew of no incumbrance. The purchaser, on completing his purchase, obtained from the trustees a power of attorney to receive the dividends, under which he received them for about six years, when the first incumbrancer filed his bill, and obtained an injunction to restrain the bank from paying the

dividends; but on the facts above mentioned, appearing in Brown's answer, Lord Eldon dissolved the injunction. There is no report of the argument or judgment in that case, but it will be observed, that the power of attorney to receive the dividends, which Brown took as part of his security, was an actual dealing with the trustees for the legal interest which brought the case within the principle of *Stanhope v. Earl Verney*; and there can be little doubt that Lord Eldon had in his mind a similar case, *Cator v. Lord Pembroke*, 1 Bro. C.C. 301., before the Lords Commissioners, and affirmed by Lord Thurlow, 2 Brown, C.C. 282. In that case Lord Bolingbroke, under a settlement, was tenant for life of a freehold estate, with power to revoke the uses and limit the estate to trustees, upon trust to sell with his consent, and the trustees were to lay out the purchase money upon the trusts of the settlement. He granted an annuity to Mrs. Hare, secured by a demise for a term of years, if he should so long live, and afterwards revoked the uses of the settlement, and limited the estate to the trustees, who sold the estate, with his consent, to the Plaintiff. The trustees received the purchase money, and invested it in South Sea annuities. Lord Bolingbroke then sold his life interest in the South Sea annuities, to Boldero, who had no notice of the annuity, and Boldero, at the time of his purchase, took from the trustees, a power of attorney to receive the dividends. Mrs. Hare evicted Cator by ejectment, the sale being held invalid against her at law, on which Cator filed his bill for a transfer of the South Sea annuities; but his bill was dismissed, the power of attorney being deemed equivalent to a declaration of trust by the trustees.

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The cases, therefore, prior to *Dearle v. Hall*, and *Loveridge v. Cooper*, determined that a party who took a conveyance or assignment of an equitable interest in land, or personally for valuable consideration, without notice of a prior incumbrance, and with an actual dealing with the trustee of the legal estate, or the fund, by making him a party to the deed, or to the transaction, obtained a better right to call for the legal estate, or the fund, than a prior incumbrancer who took his conveyance or assignment without any such dealing with the trustee. It was deemed in some sense a getting in of the legal estate or fund, and where there was no such dealing for the legal estate or the fund with the trustee, a first incumbrancer, was not postponed to a second incumbrancer, merely by omitting to give notice of his incumbrance, although such omission might have caused the loss sustained by the subsequent incumbrancer, because the second incumbrancer, taking only an equitable interest, knew that he necessarily took it subject to all existing equities.

But *Dearle v. Hall* and *Loveridge v. Cooper* are not authorities to warrant the decision in the present case, because the subsequent incumbrances in those cases made inquiries of the trustees before they completed their purchase and gave notice, the Respondent merely dealt for such security as the Marquis of Blandford was able to make. The Respondent knew the very special nature of the trusts reposed in the trustees: he made no attempt to deal with them, as he knew it was inconsistent with their trust, in the lifetime of the Duke of Marlborough, to assist in any security in which they did not receive the purchase money. He took his chance of the value of the security obtained from the mar-

quis. His notice to the trustees four years afterwards bound them to nothing, but to discharge his incumbrance according to its priority, precisely as if his notice had been so expressed. He merely stands in the place of the marquis. He has nothing to complain of on the part of the Appellant. Why, then, should he be allowed to destroy the Appellant's security?

In the case of several incumbrances without notice, the language of the courts has always been, that he who could first *get in* an outstanding legal estate would obtain priority; but if the present decree be affirmed, that language must undergo alteration. It will not be necessary to *get in* the legal estate; it will be sufficient to give notice of the subsequent incumbrance to the trustee of the legal estate—notice, and not getting in the estate, will be the *tabula in naufragio*. If that be the law, it is surprising that so much should have been said in the numerous cases on this subject, about the necessity of getting in the outstanding estate, and particularly by Lord Eldon, who speaks of getting in the term, in some sense, by making the trustee a party to the deed.

It is surely unwise to make arbitrary rules in the transfer of property, where they are not calculated to prevent fraud, and may occasion much inconvenience, and lead to much litigation. Questions of embarrassment and difficulty will probably arise out of this new doctrine: a trustee may accidentally hear of an incumbrance from a stranger, with more or less looseness of information. Is that to give a priority?

Trustees of the legal estate in land, as well as of a trust fund in personalty, may be in various places.

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One may be discovered by one incumbrancer, and another by another: one incumbrancer may give notice to one of several trustees, and another to all the other trustees; some of the trustees may have never acted, nor intended to act. The legal estate in land may descend to an infant, or to coparceners, or coheirs in gavelkind: one coheir may be adult, another may be just born. Is notice to an infant, perhaps at school, perhaps in a nurse's arms, to be held a getting in the legal estate—to be the *tabula in naufragio*? The legal estate in the present case might have descended to a child, or several children. If the doctrine be confined to prior decisions by which the making of the trustee a party to the deed, or to the transaction, is held to be a getting in of the estate, it is sound and intelligible; but if it is to be extended to cases of mere notice, it is not easy to say to what inconveniences, litigation, perplexity, and expense it may lead.

For the Respondents,

Mr. Pemberton and Mr. Cockerell.

Preliminary objection. — This decree has not been enrolled and cannot be so until it has been signed by the Lord Chancellor\*, the cause may be reheard if the decree is not enrolled. In *Barton v. Bateman*†, in this House, it was held that the decree not having been signed by the Lord Chancellor, the appeal was irregular, and it was dismissed accordingly. Even in the Court of Chancery an appeal will not lie from the Rolls unless the decree has been signed and enrolled, and for the same reason: *Coningham v. Coningham*.‡

Upon this point it was moved by the House that

\* 3 Geo. 2. c. 30.    † 2 B. P. C.    ‡ 1 Amb. 91.

the decree should be enrolled before pronouncing judgment, and the hearing of the cause proceeded.

For the Respondents : —

There are two points : 1st, The form of the security. 2d, The notice given to the trustees. Under the deeds of February and August, 1812, the Marquis of Blandford had only an interest in the surplus of the purchase money upon the sale. All parties contemplated an entire conversion of the land into money, and the application of that money in the execution of the trusts. The marquis had no interest in the land, or, if any, it was the mere possibility of the reversion, if the trustees should not sell. Having such equitable interest, the marquis grants a term to the Appellants, with a power of distress. This conferred no rights at law. But if the estates were unsold, they might have had remedy in equity. On the other hand, the Respondent's security was an assignment of the monies, the produce of the sale, and a power of attorney to sue the trustees. It is said that a court of equity disregarding power, and looking to substance, would make the Appellants' security available, as against the grantor. That might be so; but as against the trustees that equity is doubtful, and as against an assignee having a direct right against the trustees, still more doubtful. On the second point it is argued against the Respondent, because he made no inquiry before he advanced his money and took his security, and that he delayed his notice five years. But inquiry would have been useless; the trustees had no information to give, since the Appellant had neglected his duty in giving notice. Inquiry would only have misled the Respondent into a bill if that no charge had

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been exacted. Inquiry and notice could have had no other effect than to charge the trustees if they parted with the property. The effect of notice is to make the trustees hold in trust for the party giving the notice. It gives him equitable possession of the trust or charge in action. The property was not fully sold until 1819; then the surplus was realised and the notice became material. The rule adopted by the decree accords with the practice of conveyancing, and the convenience of the public making such property marketable, and the purchaser secure.

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The case of *Hulton v. Sands* \* in the Exchequer 1832, is a decisive authority for the Respondents in this case.

In Reply. The decision in *Hulton v. Sands*, like those in *Dearle v. Hall*, and *Loveridge v. Cooper*, is an innovation upon or at least an extension of the ancient doctrines of the court. But in all those cases inquiry was made of the trustees, by the subsequent incumbrancer before he paid his money and took the security, and notice was given immediately upon the transaction.

In the Report of *Hulton v. Sands*, in Young, it is merely stated that notice in writing of the grant of annuity of 10th May, 1828, to Plaintiff Kennedy, was duly served upon the trustees; and that notice of the assignment from the Plaintiff Kennedy to Defendant Hulton, was served on the trustees. But it was proved by the Defendant Flather, one of the trustees, that between the 12th and 20th of September 1827 the Plaintiff Kennedy inquired of him if there were any charge or incumbrance on the trust funds, and

\* Young, 602.

a day or two afterwards repeated his inquiry; and that on the 2d of June 1828, he (Flather) received notice of the Plaintiff's annuity deed. He also proved that in the first week of October 1828 the Plaintiff Hulton inquired of him, whether the annuity of 62*l.* 8*s.* was the first incumbrance, and that on the 4th of November 1828, he (Flather) received notice from the Plaintiff Hulton of the assignment.

The Plaintiff's case therefore was directly brought within the decisions of *Dearle v. Hall* and *Loveridge v. Cooper*.

*Lord Lyndhurst.* — I move your Lordships for judgment in the case of *Foster* against *Cockerell*, which was argued some time since at your Lordships' bar, and your Lordships at that time had pretty well made up your minds upon the subject, but it turned out that the decree was not enrolled; the parties have since enrolled the decree, and therefore the cause is now in such a situation, that your Lordships may proceed to give judgment upon it. This was a question of priority between two equitable incumbrancers,—a question whether the subsequent incumbrancer of the equity, having given notice to the trustees of the fund, was entitled to priority over the former incumbrancer. Now, that question has been settled after much deliberate discussion, in the cases of *Dearle v. Hall*, and *Loveridge v. Cooper*. Those two cases were argued before Sir Thomas Plomer as Master of the Rolls, with great learning, and attention to the subject. The Master of the Rolls, after considering the question, pronounced a very elaborate judgment, deciding that in cases of this descrip-

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tion, the party who gave notice to the trustees was entitled to the priority; and without adverting to the particular facts of those cases, the principle upon which the decisions were founded was this, that if a contrary doctrine were to prevail it, it would enable a *cestui que trust* to commit a fraud; he might assign his interest first to one and then to a second incumbrancer, and that second incumbrancer would have no opportunity by any communication with the trustees, of ascertaining whether or not there had been a prior assignment of the interest. There was also another principle upon which he decided that case, which was this, that a party till he gives notice to the trustee, has not done every thing necessary to complete his title. In such cases, it is necessary for the parties to do every thing in their power. Further than that he assigns as an additional reason, that until notice was given to the trustees, they did not in fact become trustees for the assignee. It was upon these distinct grounds that he laid down as a general rule, that in case of an equitable assignment, the party giving notice to the trustees, although he was the second incumbrancer, was entitled to priority, if the former incumbrancer had given no such notice. These cases afterwards came before me when I had the honour of presiding in the Court of Chancery, and they were again argued before me with great ability and learning. I took time to consider the judgment on those occasions, and I was satisfied after deliberate consideration, that the judgment pronounced in each of those cases was correct, and that it was my duty to affirm those judgments.

Now, the principle of those authorities applies

directly to the present case. There are two incumbrancers of an equitable interest: the latter gave notice to the trustees, the former neglected to do so. The Master of the Rolls, Sir John Leach, when this case came before him, was of opinion, in conformity with the decisions already pronounced, that the notice gave to the second incumbrancer a prior right; and under these circumstances, I think the decision so pronounced upon these principles by the Master of the Rolls, was a correct decision, and that your Lordships will be disposed to affirm the judgment, — and as the case has already been decided after deliberate argument, this judgment ought to be affirmed with costs.

Judgment affirmed.

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RYALL v. ROWLES.

The opinion of Mr. Justice Burnet taken from his MS. note book in the library of Lincoln's Inn.

The case upon the pleadings appeared to be this.

William Harvest, a trader within the several statutes concerning bankrupts, being indebted to Benjamin Tomkyns and Joseph Tomkyns in 1500*l.*, by indenture of the 2d of June 1732, demised to them his house and brewhouse at Kingston in Surrey, with all the coppers and utensils of brewing, fixed or belonging to the brewhouse, or used with it, for a term of five hundred years, redeemable on payment of 1500*l.* and interest. These premises had been mortgaged before in 1725 and 1731, to Philip Stone, as will be observed hereafter. Upon this mortgage the Master reports due to the Tomkynes 754*l.* 3*s.* 6*d.*

In October 1736, Wm. Harvest entered into articles for a partnership with Jonathan Stevens, in his trade of a brewer, the utensils and stock were appraised at 14,000*l.*, and Harvest, by indenture of the 29th November 1736, in consideration of 7000*l.* in hand paid, sold and conveyed a moiety of the utensils and stock in trade to Stevens, and entered into a partnership with him by moieties for seven years: in consequence of which, they jointly possessed themselves of the stock and utensils, and jointly carried on the brewing trade

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therewith till the 26th June 1740, when it is agreed on all hands that Harvest became a bankrupt, and a commission issued against him. In less than a month after this deed of partnership, Wm. Harvest, by indenture of the 24th December 1736, in consideration of 4000*l.* lent him by Jonathan Stevens, sells and assigns to John Potter (in trust for Stevens) all his moiety of the partnership stock, utensils, debts, and future profits in trade, with a clause of redemption on payment of 4400*l.* on the 24th December 1738. There is a clause to charge the premises with any other sums that Stevens should in the mean time lend to Harvest. On the 10th of December 1737, Harvest mortgages one-seventh part of his undivided moiety of this partnership stock, utensils, debts, and profits of the trade, to Sir Thomas Reynel, for a just debt of 1000*l.* and upwards. On the 24th of April 1738, he mortgages another seventh part of this moiety to Thomas Shipp, for a just debt of 1000*l.* and upwards. Harvest had in 1725, conveyed his house and premises at Kingston, to Philip Stone and his heirs, redeemable on payment of 1200*l.* and interest. In 1731, by indorsement on this mortgage, the utensils of brewing fixed or used with the brewhouse were assigned, as a collateral security on 800*l.* more being lent, for the 2000*l.* and interest; and in 1734, this mortgage was assigned by Philip Stone to Edward Baugh; he, by deed of the 9th of November 1736, reconveys to Wm. Harvest all the utensils as fixed or used with the brewhouse. But when Edward Baugh, afterwards by lease and release of the 6th and 7th of September 1738, assigns his mortgage of the house and brewhouse to Jonathan Stevens, Wm. Harvest, who is a party to the release, *sells and assigns his moiety of the utensils of brewing to Jonathan Stevens, redeemable on payment of the mortgage money, i. e. 2000*l.* and interest. And on this mortgage the Master reports 2355*l.* 10*s.* 9*d.* to be due. I state this, because it may be material in our future consideration of Tomkyns's mortgage.*

The last mortgage is on the 6th of March 1738, of another seventh share of the bankrupt's undivided moiety of the partnership stock, utensils, debts, and produce of trade, to his son George Harvest, for a just debt of 1000*l.* After every one of these mortgages or assignments, Wm. Harvest continued in the trade, directing the application of the stock and utensils in carrying on the trade, and in the receipt of the debts and perception of the profits of the trade as partner for a moiety, just in the same manner as he had done before the mortgages, or any of them.

The general question, therefore, arising on this case was, whether these six mortgagees, or any, and which of them, will be entitled to resort to the respective utensils, stock in trade, debts or profits of trade, mortgaged to them; or whether all or any of them will be obliged to come in as creditors under the commission, to receive a distributive share of their respective debts in common with the rest of the bankrupt's creditors?

And the solution of this question depends on one still more restrained, which is, whether these six mortgagees, or any, and which of them, have so permitted the bankrupt to continue in the possession, order, and disposition of the goods and chattels conveyed to them, to the time of his becoming bankrupt, as will entitle the commissioners to sell and dispose of the same for the relief of the creditors seeking relief under the commissioners by the express words of the statute of the 21 Jac. 1. c. 19. ss. 10, 11.?

In determining this question, my Lord Chancellor Hardwick was pleased to call for assistance of L. C. J. Lee, L. C. B. Parker, and Mr. J. Burnett.

My argument was as follows :—

In the consideration of this question, it will be necessary to distinguish between the mortgages. Two of them are (as far as concerns the present question) mortgages of *utensils only*, fixed or used with the brewhouse. One of them is to a stranger prior to the mortgage, the other is of a moiety of those utensils to a partner.

A third mortgage is of things partly in possession, partly in action, a moiety of the partnership stock and utensils, and a moiety of the debts and profits of trade to John Potter, in trust for the partner Stevens. The three other mortgages are to strangers, of a seventh share each, in the bankrupt's moiety of the partnership stock, utensils, debts, and produce of trade. I shall, therefore, in the first place consider the case of a mortgage or conditional sale of things in possession. In the next place I shall consider the case of such a mortgage of things partly in possession, partly in action. And under each head shall examine whether such a mortgage, being to a partner or in trust for a partner, will make any difference.

And though the present question must receive its sole determination from the clauses in the stat. 21 Jac. 1., yet it will be necessary to consider the state of creditors in general, with relation to the conveyances of their debtors, before that statute. But as great stress was laid in the argument of this case at the bar, upon the rules in pawns; and mortgages of goods were

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treated as pawns without a delivery, or rather hypothecations, which require no delivery, I shall in the first place endeavour to shew that pawns or hypothecations are quite foreign to the present question. It was contended that pawns, both by the Roman and English law, required a delivery, but hypothecations or mortgage of goods did not; and therefore in this latter case there could be no fraud in not altering the possession.

As to the Roman law, Mr. Wilbraham truly cited the authority of Justinian, lib. 4. tit. 6 & 7: — "*Pignoris appellatione eam rem proprie contineri dicimus quæ simul etiam traditur creditori, maxime si mobilis sit. At eam quæ sine traditione, nuda conventionione tenetur proprie hypotheca nomine contineri dicimus.*" And if this passage stood alone unexplained by any other Roman law, it would go a great way towards proving what it was cited for. But when I shall have produced two or three express authorities that prove beyond question that a Roman *pignus* fo a moveable thing was as valid without a delivery as with it, I believe it will be allowed that Domat and our countryman Wood have rightly interpreted the passage above cited to mean no more than that a *pignus* can only be of moveables capable of a delivery, and a *hypotheca* must be of immoveables incapable of such a delivery. So is Domat, "*Loix Civiles dans leur ordre naturel,*"—lib. 3. tit. 1. s. 1. par. 1.; and Wood in his "*Imperial Civil Law,*" lib. 3. c. 2. f. 219.; and with this agrees the Digest, lib. 50. tit. 16. *De verborum significatione*,—Law, 238. It is held that a *pignus* did not require a delivery,—Digest, lib. 13. tit. 7. Law, 1. "*Pignus contrahitur non solum traditione sed etiam nuda conventionione etsi traditum non est.*" So if a thing is pawned at different times to two, and delivered to the last pawnee, the first shall be preferred to him. Digest, lib. 20. tit. 4. Law, 12. § 10.: — "*Nam et in pignore placet si prior convenerit de pignore licet posteriori res tradatur potius esse priorem.*" And in that very 20th Book of the Digest, tit. 1. Law, 10., the case is cited of a thing pawned at the same time to two and delivered to one. From all which cases it manifestly appears that delivery was not necessary to a Roman *pignus*. And the inconvenience attending this made most of the nations that received the Roman law in general vary this part of it, by their municipal laws, as Domat observes. But suppose the distinction contended for, were true, what would it signify unless an English mortgage and a Roman *hypotheca* were of the same nature? which they certainly are not, though our learned civilian, Dr. Strahan, in his translation of Domat, has every where rendered the word *hypothèque* by that of *mortgage*. An

English mortgage conveys an immediate property in the thing mortgaged, liable to be defeated by performing the condition. A Roman *hypotheca* conveys no property, but a right to be satisfied for the breach of a condition, for the injury done by that breach. If, therefore, either a *pignus* or *hypotheca* be with a condition, that if the money is not paid at the day the creditor shall enjoy the thing pawned or hypothecated at such a price, this is held to be a conditional instead of a pawn. Digest, lib. 20. tit. 1. Law, 6. Domat, lib. 3. tit. 2. sect. 3. par. 11. If any one, out of curiosity, desires to see English contracts described in Roman laws, he may find our mortgages both of land and goods, under the head of sales, Justin. Codest. lib. 4. tit. 54. Law, 2 & 7. "*Si fundum parentes tui ex lege vendiderunt ut sive ipsi seu hæredes eorum, emptori pretium infra certa tempora, obtulissent, restitueretur : Teque parato satisfacere conditioni, Hæres Emptoris non parit ut contractus fides servetur, actio præscriptis verbis, seu ex Vendito tibi dabitur.*"

And as to mortgage of goods: "*Si quis a te comparavit et convenit ut si infra certum tempus soluta fuerit data quantitas ut sit res inempta, remitti hanc conventionem Rescripto nostro non-jure petis.*" All therefore which can be urged from the Roman law, in respect either of pawns or hypothecations, must be foreign to the present question, which relates to a quite different contract; and so I think is all that may be urged from the English law as to pawns.

Delivery is certainly of the essence of an English pawn, as is expressly held in the year book, 5 H. 7. f. 1, abridged *Bro. Pledges*, pl. 20. *Trespasa*, pl. 271., cited by Mr. Solicitor-General. And with this agrees the determination of the K. B. in *Rosse v. Bramstede*, 2. Ro. Rep. 439. L. C. J. Ley, in the report of that case, says: "If I lend you a horse, and before you restore it, say, Keep that horse till I pay you 10*l.* which I owe you; this, is a pawn. But if a stranger had taken it from you, and I said, 'Take that horse, and keep him till I pay you 10*l.*, this is no pawn, for there was no possession given at the time," and I know of no authority in all the books to the contrary. For the cases of *Brand v. Lisly*, Yelv. 164, and *Clerk's case*, 2 Leon. 30., which were cited as contrary, are not cases of pawns, but of bailment of goods to a third person, to pay creditors, and it was truly held that the creditor had such an interest in this contract as would entitle him to a remedy if the goods were taken from the bailee, or by him applied to any other purpose than that for which they were bailed. All the cases in the books relating to pawns suppose them in the pawnee's custody. They are compared to a distress, and it is considered how far

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the pawnee may use them and at what peril. *Conham v. Mores*, Owen, 123. And in the argument of the case of *Coggs and Barnard*, 2 Salk. 522., 2 Lord Raym. 917.; and in the case of *Sir John Ratcliff v. Davis*, Cro. Jac. 244. Yelv. 179. 1 Bulstr. 29. and Noy, 137., the distinction between pawns and mortgages is clearly stated. Sir John Ratcliff pawned his hatband set with diamonds to Whitlock for 25*l*.; Whitlock's wife by his order delivered the pawn to the defendant. After this Whitlock died, leaving his wife his executrix. Sir John Ratcliff tendered her the 25*l*., which she refused to receive, and thereupon he demanded the hatband of the defendant, who refused to deliver it. In trover brought by Sir J. Ratcliff against the defendant for this hatband, a verdict was given and judgment for the plaintiff, and it was resolved:—First, that the general or absolute property in the pawn was in the pawnor, though there was a special property in the pawnee entitling him to the custody till the condition performed:—Secondly, that upon payment or tender to the pawnee, the whole property was immediately revested in the pawnor; and if the pawnee bail over the pawn, still the payment or tender must be to the pawnee or his executrix, and not to the bailee. But it was quite otherwise in a mortgage; for if the mortgage is assigned over, the payment or tender must be to the assignee, and not to the mortgagee. And why? Because a mortgage is a conveyance of the property immediate, which therefore may be assigned over; but a pawn is only a deposit to secure the performance of a contract.

All therefore that has been urged with relation to pawns, being laid out of the case as quite foreign to our present question, I shall consider how the law stood in relation to conveyances made by debtors to the prejudice of their creditors before the stat. 21 Jac. 1. The statute governing in these cases, though perhaps no more than declaratory of what was the common law, is the stat. 13 Eliz. c. 5. §. 1. 2., whereby "all grants or conveyances of lands, or goods, to the intent to defraud or delay creditors, are made void, and subject the debtor making such conveyance to forfeit double the value of the lands or goods so conveyed, and to half a year's imprisonment. *Proviso*, that this act shall not extend to any estate or interest in lands or goods conveyed upon good consideration and *bonâ fide*." As this statute was made to protect creditors against conveyances with an intent to defraud or delay them, so it was incumbent on courts of equity and juries, upon considering all the circumstances that attended a conveyance, to pronounce whether it was with that intent or not. Wheresoever a purchaser

of land neglected a material step for his own security, which neglect had a natural tendency to defraud creditors, this was held *primâ facia a badge of fraud*, as leaving the title deeds in the hands of the mortgagor. So, where a buyer of goods neglected a material step for his security, which naturally tended to delude creditors, as leaving the goods in the possession of the seller, this was looked upon as a badge of fraud; yet as these were no more than tokens of fraud, if from other circumstances it appeared that the title deeds could not be left with the mortgagor with any such intent, or the goods with the seller with any such intent, in such a case neither courts of equity nor juries could pronounce such conveyances to be void. The leading case as to goods, is *Twyne's case*, 9 Co. 80., where the sale of goods to a just creditor for 400*l.*, being for 300*l.* their true value, was held fraudulent, "in respect that the donor continued in possession of the goods and used them as his own, and by reason thereof traded and trafficked with others and defrauded them." And indeed, generally speaking, it is hard to conceive why a buyer should leave his goods with the seller but to the intent that he may deceive others by a false appearance of substance; since, whether I buy goods absolutely or conditionally, my safety in my contract depends upon taking the goods into my own possession, for if I leave them with the seller he may spoil or dispose of them. And as this *laches* of mine tends to give others a false opinion of his substance, the only evidence of the ownership of goods in most cases attainable being the possession and use, this has generally been held a badge of fraud. But where circumstances of such public notoriety have attended a contract, where the goods were left with the seller, as excluded any presumption of fraud, courts of law and equity have declared in favour of them, as I shall have occasion in considering some of the cases cited in the arguing this case to observe. But neither in the statute 13 Eliz. nor in *Twyne's case*, is there any distinction made *between absolute and conditional conveyances*; nor does there seem any such in the nature of the thing; for if a failing man was so modest as to mortgage his effects only once, for perhaps half or three fourths of their value, am not I defrauded as to his substance in one half, or three fourths, by goods remaining in his possession which his mortgagee ought to have put out of his reach? But if delivery on a mortgage is quite needless, why may he not mortgage the goods twice or thrice over, as well as once? and then my delusion is as great as if he had sold them outright.

But it was said that there were cases in the books, which

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settled the distinction between a possession in the debtor after an absolute and after a conditional conveyance. The first case cited was that of *Stone v. Grubham*, 2 Bulstr 226., and 1 Ro. Rep. 3. That was the case of a grant, which from the words of it was held to amount to the grant of a lease for years. It was insisted that this was fraudulent, because the grantor continued in possession of the land after the grant. But the Court resolved that in this case, which was a gift upon a future condition, as well as in the case of a mortgage, the grantors continuing in possession of the land would not make it fraudulent. But Lord C. J. Coke said, "If the grantor had continued in possession of the original lease, under which the land was held after such a grant, that would have made it fraudulent." And pray what argument can be drawn from this case, as to the possession of goods after a conditional conveyance, unless the possession of land and that of goods stand upon the same foot, which doubtless they do not?—possession after sale is no otherwise fraudulent than as it tends to deceive creditors. If the possession of land has no such tendency and the possession of goods has, then one will be fraudulent and the other not. A man who is in possession of land may be so barely as tenant at will, as the mortgagor always is to the mortgagee, but no creditor need be deceived by such a possession. For as every man who desires me to give him credit gives me a right to inquire into his substance, if he insists to have credit as owner of the land he possesses, I may call upon him to produce the evidences of his title.

If these, therefore, are permitted to remain in his hands which ought to have been in the mortgagee's custody, as the means of reducing the land into his own possession, the mortgagee has neglected what was necessary for his own security, and furnished the mortgagor with the means of deceiving the most cautious creditor, as owner of the land. This, therefore, in the case of *Stone v. Grubham* is considered as a *badge of fraud*; and Lord Talbot says the *first mortgagee has contributed to draw in the second*, in the case of *Head v. Egerton*, 3. P. W. 280. But it is far otherwise in the case of goods, for, where those are sold, be it absolutely or be it conditionally, the vendee can only secure himself from the sale, or destruction of the goods, by taking them into his own possession. And if they are left in the vendor's hands, the most careful creditor can in general expect no other evidence of property in goods than the possession and user. The vendee must therefore suffer for having furnished his vendor at his own hazard with the proper means of imposing on others as to his substance.

The next case cited to support the distinction between absolute and conditional sales is that of *Buchnal and Others v. Royston*, Precedents in Chanc. f. 286. The case was this: A supercargo to an Indiaman having shipped goods of his own fit for foreign markets on board, borrowed 600*l.* on a bottomry bond, to pay 40 per cent. interest if the ship reigned 3 years. As a security for the performance of this contract he made a bill of sale of his goods on board to the Plaintiffs. In it there was a clause that the vendor should act as factor to the vendees in selling the goods at foreign markets, and investing the produce in a homeward-bound cargo. He did so, and died on the voyage. The ship arrived. The Defendant as principal creditor took out administration to him, and possessed himself of this cargo. The Plaintiffs brought their bill against him, insisting on their bill of sale. The Defendants insisted that the intestate having continued in possession of these goods after the bill of sale, would make it fraudulent as against creditors, of which number he was. Lord Cowper decreed in favour of the Plaintiff. He went upon no distinction between conditional and absolute sales, but upon the notoriety of the whole contract, whereby any one who knew the intestate had the possession of these goods, might as well know that it was not as owner, but as factor to the vendees. His words are, "there was not a possession calculated to acquire a false credit, as in the cases cited." Which is a strong declaration of his, that in this which was a conditional or redeemable sale, a possession calculated to acquire a false credit would make it void, but that in the present case there was no such possession. This case, therefore, is so far from establishing a distinction between conditional and absolute sales, that it is an express authority of Lord Cowper's that there was none. The last case relied on to support such a distinction is the case of *Meggot v. Mills*, 1 Lord Raym. 286. The same case is reported in Cases in King William's Reign, f. 159. From both reports of this case it appears the law was so obscurely stated that the Court sent it to a new trial. But the case is cited out of Lord Raymond's reports for a *dictum* in it of L. C. J. Holt. The case seems to have been this. A man let a house to a trader, and lent him money to buy furniture for the house, and took a bill of sale of the furniture for his security. The trader continued in possession of the house and furniture home to his bankruptcy. There is no notice taken throughout the whole case of the statutes relating to bankrupts. But L. C. J. Holt takes it up upon the general principles of fraud, and is of opinion that this bill of sale was not fraudulent. Whether he considered it as in nature of a

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lease of a house ready-furnished, or what other matter weighed with him, is not very clear from this obscure report. But one thing is very clear, that he did not found his opinion on any distinction between conditional and absolute sales, but between such a sale to a landlord and any other creditor. His words are, "This possession in the vendor after a bill of sale, to any creditor but the landlord, would have made it fraudulent." This, therefore, is an express opinion of L. C. J. Holt—that *possession*, after a *redeemable sale* in the vendor is in general a *badge of fraud*, though in the particular circumstance of the landlord in this case it was not so. The distinction, therefore, between conditional and absolute sales is so far from being supported by this case, that it is plain L. C. J. Holt thought there was none. But though from all these cases it appears that conditional and absolute sales by debtors to the prejudice of their creditors stood upon the same foot by the stat. 13 Eliz., yet it is plain that a court or jury were left at large upon the whole, to consider whether the conveyance before them were made with an intent to delay or defraud creditors, and accordingly to pronounce in favour of or against the conveyance. But when commissioners of bankrupt were to be directed what goods in the bankrupt's possession they might intermeddle with, though others might set up a claim to them, it behoved the wisdom of the legislature to give them more precise rules. And upon the plain construction and manifest intent of the clauses in the 10th and 11th sect. of the stat. 21 Jac. c. 19. the solution of the present question must depend.

The latter part of the 10th sect., though by mistake printed apart, is plainly the preamble to the 11th sect., and consequently the key to let us into the intent of the legislature in the enacting clause. The words are, "And for that it often falls out that many persons before they become bankrupt do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed the owners thereof, and do dispose of the same as their own, be it enacted," &c. It was much litigated at the bar whether the enacting clause should be restrained to this case in the preamble, or be extended to *goods and chattels* in the bankrupt's hands which were not conveyed by him to the owners. I shall give no opinion at all upon this head; for whether the enacting clause extends to cases not within the preamble or not, it is agreed on all hands that it must extend to the case in the preamble, which I apprehend to be the case now before the court. I am now only considering the case of things in possession, and, doubtless, all these in our

cases were conveyed conditionally to others for a valuable consideration before he became a bankrupt, and at the time of his bankruptcy he kept and disposed of a moiety therein as his own, and was the reputed owner of a moiety; and as the statute makes no distinctions between absolute and conditional conveyances, and there is none in reason, there can be no doubt but that mortgages of goods are within this preamble. Let us see, then, if they are not within the express words of the enacting clause; they are, "that if at any time hereafter any persons shall become bankrupt, and at such time as they become bankrupt shall by the consent of the true owner or proprietary have in their possession, order, or disposition any goods or chattels whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition, as such owners, that in every such case the commissioners, or the major part of them, shall have power to sell and dispose of the same to and for the benefit of the creditors that shall seek relief by the said commission, as fully as any other part of the bankrupt's estate." And as the preamble makes no distinction between conditional and absolute sales, neither can it be said that the enacting clause makes any. But it was contended that conditional sales are not within the description of the enacting clause, for the bankrupt himself is the true owner and proprietary, and not his mortgagee. And if mortgages were upon the foot of pawns, there might be some foundation for this objection, for the pawnor has the general property, and the pawnee only a special property, according to the case cited of *Waller v. Hanger*, 3 Bulstr. 17. But in the case of mortgages, the mortgagor has a bare condition; the mortgagee is owner and proprietary, even in the case of land. Co. Lit. 210. It is stronger in the case of a conditional sale of goods, of which the whole property is in the vendee, and on the price paid he has a right to the delivery of the goods. 10 Salk. 113. *Langford v. Tyler*, Dyer, 20. 203. If, therefore, a conditional vendee will pay his money and not insist on the delivery of the goods, his personal confidence in the vendor, whereby he left him a false appearance of substance wherewith to draw in others to trust him, shall not prejudice them, but he shall come in with the rest of the creditors, since like them he placed his confidence in the vendor, and not in the goods sold; and this is a point which was resolved expressly by Lord Talbot in the case of *Stevens v. Sole and Others*, in Chancery, Trin. Term, 1736. The case was this: William Tappender, a trader within the statutes of bankrupts, being possessed of a leasehold estate and of three hoys, on the 19th of April 1729, borrowed 1400*l.* of the Plaintiff

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Stevens, and made him an assignment of the leasehold premises, and a bill of sale of the three hoys, the whole redeemable on the payment of 1400*l.*, with interest. In May 1731, Tappender became a bankrupt, and the Defendants were assignees under the commission. The Plaintiff brought his bill against them, to be paid his principal, interest, and costs, or else that they might be foreclosed of the equity of redemption of the leasehold and three hoys.

The Defendants, in their answer, admitted that the leasehold estate was not sufficient to pay the Plaintiff's debt; but insisted as to the three hoys, that as William Tappender continued in the possession of them home to his bankruptcy, that they were by the express words of the stat. 21 Jac. 1. c. 19. liable to be sold for the benefit of the creditors under the commission. Lord Talbot decreed a foreclosure as to the leasehold premises, and that the Plaintiff should be admitted as a creditor under the commission, for so much as the leasehold premises were deficient in value to satisfy (which was referred to a Master to settle), and ordered that the Plaintiff's bill should be *dismissed as to the three hoys, or the produce of them* (for they were sold by consent pending the cause); and decreed that the money raised by the sale of the three hoys should be retained by the Defendants as assignees, to be by them applied to the payment of the creditors seeking relief under the commission. It was inuinated as if subsequent cases had taken from the authority of this; I know of none. The first case mentioned was that of *Browne v. Dodson*, heard before the present Lord Chancellor, 4th December 1740. I need say no more than that this case never received any judicial determination. It was the case of an assignment of ships and goods at sea, and the Lord Chancellor said, if the assignment was void, it was void at law, and therefore directed a trial at law, expressing at the same time an apprehension, that on the one hand it might be inconvenient to construe sales of ships by way of mortgage, of which no delivery could be made until their return, to be within the statute 21 Jac. 1. c. 1.; and, on the other hand, the great mischief that might ensue from construing mortgages to be out of the statute. The other case cited was that of *Brown and Others, Assignees of Williams, v. Heathcote*, heard before the present Lord Chancellor on 27th October 1746. The case was this: Williams and Wilder, partners in trade, were indebted to Mr. Heathcote in 1200*l.* By deed in January 1736, they assigned over to him their ships, the Samuel and Molly, and their outward-bound cargoes, and the returns of those by their homeward-bound cargoes. At the same time they delivered to Mr. Heathcote the charterparty, invoice, bill of lading, and consignment. In

November, 1737, Williams became a bankrupt. In July, 1738, the ships arrived, and Mr. Heathcote possessed himself of the ships and cargoes. It was contended that as there was no delivery of possession to Mr. Heathcote, but the possession continued in the bankrupt and his servants till their return, this was a case within the stat. 21 Jac. 1. The Lord Chancellor decreed for the Defendant, as being a case neither within the letter or intent of that statute. And, indeed, I do not see how this case comes within any one description in that statute. After every evidence of ownership delivered up to the assignee, how can the assignor be said to be the reputed owner of these ships and cargoes? when all the muniments or means of reducing the ships and cargoes into possession on their arrival are given up, how can the assignor be said to have them in his possession, order, and disposition? or how can he take upon him the sole alteration or disposition as owner? How can the bankrupt be said to continue in the possession of these things and cargoes by the consent of the true owner or proprietary, when it is impossible he should alter the possession of what is not within his reach? and what false credit can the assignors acquire as owners of ships and cargoes at sea, to which they cannot shew one evidence of ownership? I confess, if ships and cargoes at sea are in the nature of things in action, I should apprehend that a delivery of the muniments or means of reducing them into possession on their arrival was equivalent in law to a delivery of possession, it being all the delivery the nature of the thing will admit of; as the delivery of the key of a warehouse in the case of a sale of bulky goods not capable of immediate removal, has been held a delivery of the goods; by it the seller is deprived of the power of showing the goods as his own, and thereby acquiring a delusive credit. Neither of these cases, therefore, do in the least impeach the authority of *Stevens v. Sole*. I shall therefore conclude that goods conveyed by the bankrupt to others, who permit him to continue the possessor, reputed owner, and to take upon him the disposition of, as owner, will be liable to a commission of bankrupt by the express provision of this statute; and this is applicable to two of the mortgages now before the Court, that of the utensils to Tomkyns in 1732, and that of a moiety of those utensils to Stevens in 1738, though it is plain that these mortgages will require very different considerations. The mortgage of the real estate in 1738 to Stevens being as to that but an assignment of an original mortgage to Stone in 1725 and 1731, on which 2300*l.* and more is due, will plainly exhaust the whole value of that estate, which chiefly consists in houses valued but at 200*l.* a year, so

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that nothing of that can be left to satisfy Tomkyns's mortgage in 1732, but the utensils fixed or used with the brewhouse ; and as to these, Tomkyns's mortgage must be preferred to Stevens's, whose collateral mortgage of a moiety of the utensils commences in 1738. This mortgage to Tomkyns is by lease of the house and brewhouse, and of the utensils fixed or used with the brewhouse ; and this is of a double nature,— utensils fixed, and utensils not fixed but used in the brewhouse. As to the fixtures, it seems clear to me that nobody will be entitled to remove them till Tomkyns's mortgage is satisfied ; for though it be certain that if a lessee creates fixtures for carrying on his trade, he may remove them during the term, as in *Poole's case*, 1 Salk. 368. ; yet if a trader erects fixtures in his house, and then leases the house with the fixtures, he cannot remove them during the term, no more than if he leases land without excepting the trees, he can cut down the trees during the term. And so is Hob. 173., Owen, 49. As to any utensils not fixed, the lease of a house with moveable chattels is no lease of the chattels, but a gift of them during the term. According to *Spencer's case*, 5 Co. 16, 17. ; *Read v. Lawse*, 1 And. 4., and *Dyer*, 212. These, therefore, not having been delivered, but continuing in the possession of the bankrupt, will come under the general rule, and be liable to the seizure and sale of the commissioners. As to the collateral mortgage of a moiety of the utensils to Stevens in 1738, I need not consider it as to the fixtures, for as these are valued in the Master's report at only 600*l.*, they will fall short of satisfying Tomkyns's debt, which is 754*l.* And as to the moveable utensils, they must fall under the general rule. It is true, as Stevens, by being partner with Harvest in these, was seised of a moiety in his own right, there could be no need of actual delivery to one who was already possessed of them *per my et per tout*. But when by this assignment Harvest conveyed to him the *entirety* of these utensils, the permitting him to continue possessed of a moiety is within the letter and intent of the statutes ; it is by his *consent* who is the true owner and *proprietary* of both moieties, that he continues in possession of one. He thereby is the reputed owner of that moiety. He takes upon him the *sale, alteration, and disposition* of it as owner, and thereby acquires such a delusive credit, by a false appearance of substance, as the statute intended to prevent ; so that it is plainly within the mischief designed to be remedied. It may be asked, how the commissioners shall seize an undivided moiety of utensils ? By seizing the whole and selling a moiety, and their vendee will be tenant in common with the other partner. As the sheriff in an execution against one partner may seize the whole partner-

ship stock, and sell an undivided moiety. *Heydon v. Heydon*, 1 Salk. 392.

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Having considered the case of mortgages of goods, I shall next consider the case of a share in trade, which consists partly of things in action, and partly of things in possession. And I will first consider the three mortgages of a seventh share of the bankrupt's moiety in trade, to three strangers, and then I will consider his assignment of the whole moiety to one in trust for his partner. But before I go into the consideration of this matter, I beg leave shortly to consider the case of a mere chose in action, and the simplest is that of a bond, which is not assignable at law, but is certainly assignable in equity. And why but because the assignor can furnish his assignee with the means of reducing it into possession by giving him authority to sue in his name, and putting the bond into his hands to prove the debt? Why, therefore, is not the delivery of these means of reducing a chose in action into possession, as requisite upon such an assignment as the delivery of the thing in possession? Suppose, then, a trader assigns over a bond debt, and the assignee permits the assignor to continue in possession of the bond. Why is not this within the words and intent of the statute. The assignment is a conveyance of it in equity. The assignee has a right to have the bond delivered over to him; it is therefore *by his consent* it continues in the possession of the assignor. The debt by the bond's continuing in the assignor's hands is in *his possession, order, and disposition*, and he may take upon him the *sale, alteration, and disposition* of it, for he may receive the money due on it; he may cancel the bond, or he may assign it over to another: showing the bond will make him the *reputed owner* of the debt, and this will gain him a false credit from a false show of substance. It was indeed objected, that a bond debt was a chose in action, and choses in action do not come within the words of this statute, which has in the preamble *goods*, in the enacting clause *goods and chattels*; whereas, it was said, choses in action do not come within the words *bona et catalla* in grants. Swynburn, f. 407. 8 Co. *Caley's case*. But this is a mistake. Undoubtedly choses in action are not such *goods and chattels* as will pass by grant; not because they are not *chattels or goods*, but because they are not grantable by or to a common person. But they may be granted or forfeited to the King, by the name of chattels. Bro. Prerogative, pl. 40. 3 Inst. 55. "There is a diversity between chattels personal in possession and in action; for if a debt be owing to two, and one of them is *felo de se*, he for-



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feits the whole; but otherwise it is of goods in possession, for he forfeiteth but his part." So is the case of *Boilston v. Ratcliff*, Raym. Rep. 7. Finch's Law, lib. 2. c. 17. f. 178., calls a bond debt an entire chattel personal. And the resolution of the case of *Ford v. Sheldon*, 12 Co. 1., is "that personal actions are as well included within this word *goods* in an Act of Parliament as goods in possession. As *choses in action*, then, are within the letter and intent of the statute, how can they be construed out of it? A share in trade may be a mere *chose in action*, which can only pass by assignment, as was the case of *Small v. Oudley*, 2 P. W. 427., which was held good, though made but the day before the assignor became bankrupt; but that was the assignment of a share in another man's trade, which the assignor himself was not in possession of, consequently could deliver no possession of, nor could not continue in possession, after assignment. But it is otherwise in the assignment of a share in a man's own trade; of that he may deliver possession by admitting the assignee to be a partner for that share; and had the three assignees of these three seventh parts of the bankrupt's moiety been admitted partners, they would have been in possession of the stock and utensils, and in the receipt of the debts and the profits arising from them. And why shall not the debts and profits arising out of specific goods be considered in the nature of the goods out of which they arose? This is no new way of considering this matter, even in a court of law upon this very statute, against assignees of a commission of bankrupt; and there seems to be at least as much reason to consider it in the same light in their favour. If a merchant consigns goods to a factor, and he breaks before he has sold them, they are considered as the merchant's goods, and shall not be subject to the factor's bankruptcy. If the factor has sold the goods, his own money cannot be distinguished from that of the merchant's; but if it can, as where the factor invests the money in new-purchased goods for the merchant's use, these new-purchased goods arising out of the goods of the merchant shall not be liable to the factor's bankruptcy. *Whitcomb v. Jacob*, 1 Salk. 160.

Suppose the factor sells the merchant's goods, to be paid at a future day. If he break before that day, and his assignees receive the money, this shall be money had and received to the merchant's use, as was resolved in the case of *Gunnell v. Colomb*, reserved at Nisi Prius by L. C. J. Holt, Pas. 1709, and determined by L. C. J. Parker, and the Court of K. B., Trin. 1710. Suppose he had sold the *goods*, and taken notes of hand for them, payable to the factor at a future day, before which he

broke. If the assignees receive the money on these notes, it is money had and received by the assignees to the merchant's use, for the note shall follow the nature of the goods out of which they arose; and so it was determined in the case of *Surman and Others v. Scott*, Hil. 16 G. 2. C. B. Why then by parity of reason shall not the debts and profits arising out of specific goods which were assigned by the bankrupt, and which the assignees ought to have been put in possession of, and then would have been in the perception of these profits and debts, be considered in the same light as the specific goods out of which they arose? As therefore the specific goods, by being left in the bankrupt's disposition, would be liable to the commission, so shall the debts and new-purchased goods arising by the sale of them, as they were left in his receipt and recovery.

Nothing remains, therefore, to be considered but whether this assignment of the bankrupt's moiety of this trade to Potter in trust for Stevens will fall under the same rule as the other assignments; and if this be considered as an assignment to Potter, it will admit of no distinction; but if it should be considered as an assignment to Stevens, I do not think that will materially vary the case. It is true, a partner being already in possession will need no actual delivery of the moiety conveyed to him; but he is within the letter and mischief of the statute, if after his partner has conveyed his moiety to him he permits him to continue in possession, as if he had an interest when he had parted with it. What a door would be open to frauds by collusion of partners, if one of them after a conveyance to him of the whole share of his partner permits him to retain all the badges of ownership, thereby to deceive the rest of the world by this delusive appearance of substance and wealth. It was insinuated as if partners in their dealings with each other had the partnership as a security; and if so, I agree that Stevens's mortgage will not put him upon a worse foot than he would have been on without it. But I apprehend there is no such rule. If one partner advances money to the joint stock, or if his partner embezzles any of the joint stock, this is a lien on the partnership stock, and must be satisfied before any dividend; and in this respect the partner is on the same foot with every stranger; for whosoever lends money to the partnership, must be paid before any dividend can be made of the joint stock. So is 2 Vern. 293., *Richardson v. Goodwin*. But I know of no case where it is held that a partner shall have any lien on the joint stock for what he lends his partner on his separate account; and I think there is as strong a negative

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authority as well can be, that there is no such rule in the case of *Croft v. Pike*, 3 Peere Williams, 180.

It may be said, that it will be laying dangerous restraints upon trade if a trader cannot mortgage his whole stock without quitting his trade, or mortgage any part of it without admitting his mortgagee into partnership. I confess cases may happen where this may be inconvenient. But the dangers are much greater on the other side. A man need not quit his trade because he is not allowed to carry it on as a principal when he has not wherewithal to carry it on: nor is the hardship very great to oblige him to take in partners, when he is not himself equal to the carrying on the whole. But if it is once established that the friends of a sinking man may secure themselves by clandestine mortgages of all that he has, and yet leave him with the appearance of the same substance as if he had made no mortgage, I fear in time commissions of bankrupts will be very useless remedies, when those who were privy to the bankrupt's circumstances will have exhausted all his stock in mortgages to them, and there is nothing left to divide among his creditors, who were not let into the secret.

— Upon the whole, therefore, I am of opinion that the several assignments of the moiety and seventh share of the moiety of this partnership stock created no specific lien on any of these shares. But that Harvest's moiety is vested in the assignees, and the mortgagees must come under the commission as creditors for their respective debts. But that Tomkyns in respect of the utensils fixed will have a right to the satisfaction of his mortgage so far as those will go.

Lord Chief Justice Lee and Lord Chief Baron Parker concurred with me in this opinion; and the Lord Chancellor being of the same opinion, decreed accordingly.

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## IRELAND.

(COURT OF CHANCERY.)

The Right Honourable the Lord  
Mayor, Sheriffs, Commons, and  
Citizens of the City of Dublin,  
and the Rev. WILLIAM HENRY  
ARCHER, Executor of WILLIAM  
H. ARCHER, deceased (Trea-  
surer of the Corporation) - - - } *Appellants;*

The Right Honourable FRANCIS  
BLACKBURNE, His Majesty's At-  
torney-General for Ireland, at  
the relation of JOHN M'MULLEN,  
RICHARD PURDY, and HENRY  
STAINES - - - - - } *Respondents.*

The corporation of Dublin had immemorially been seised of a water-course, from which the inhabitant householders of Dublin had been supplied with water, on certain payments made by them under contract or usage. By acts of parliament obtained in 1796 and 1809, powers were given to the corporation to levy rates upon the inhabitants and raise money on the credit of the rates, for the purpose of improving the supply of water.

Held, that the rates levied under the authority of the act could not be applied, under a resolution or bye-law of the corporation to discharge debts incurred or expenditure made upon the improvements of the water-course for the supply of the inhabitants before the passing of the acts: nor in compensation of services of the mayor or treasurer of the corporation, or salaries of new officers, or the increase of salaries of old officers.

Held also, that the costs of a former appeal, in which the cor-

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puration were respondents, might be 'given by the Court below out of the fund of the rates, though not directed by the order made on the appeal.

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**I**N 1823, his Majesty's then Attorney-General for Ireland, at the relation of the Appellant M'Mullen, Purdy, Isaac Stewart (since deceased), and Henry Staines, and the said John M'Mullen, Richard Purdy, Isaac Stewart, and Henry Staines, on behalf of themselves and the rest of the owners or occupiers of dwelling-houses within the city of Dublin and the liberties and suburbs thereof, and such parts of the liberty of St. Sepulchre as were subject to the payment of pipe-water rent, and of metal-main rates—filed an information and bill in his Majesty's Court of Chancery in Ireland, against the Appellants, stating, amongst other things, an Act of the Parliament of Ireland passed in the 15th and 16th years of the reign of King George the Third, whereby it was enacted, that every housekeeper or occupier in Dublin should provide for the use of such house or houses a branch or leaden pipe, to convey water into such house or houses, from the several mains then laid, or thereafter to be laid by the said corporation; and that the owner or occupier of every house in the said city should pay to, or to the use of the said corporation, for such supply of water, the rates in the said Act particularly specified; that the said corporation was, by the said Act, empowered to borrow money on the rates or rents granted by the said Act, in the manner therein prescribed.

The information further stated, that an Act was passed in the 49th year of the reign of his late Majesty King George the Third, whereby, after reciting that it had become expedient to secure a more ample and permanent supply of water to the inhabitants, city, &c., it was enacted, that the corporation might demand and take from the owner and occupier of every dwelling-house within the city of Dublin, &c., the annual rates or rents therein particularly mentioned; and that they might borrow at interest, upon the credit of the rates and rents granted by the said Act, and the Acts therein recited, such sum and sums of money as they should from time to time find necessary for the purpose of making the works mentioned in the recitals of the Act; and that the treasurer of the corporation, and his successors, should annually retain out of the rates or rents thereby granted, the sum of 2000*l.*, together with such sum and sums of money as should be equal to the interest payable on all such sum and sums of money as should thereafter be borrowed under the provisions of the Act, which should be appropriated as a sinking fund to pay off the sum of 67,800*l.*, and all such other sum and sums of money as might thereafter be borrowed under the provisions of the said Act, and be from time to time laid out in purchasing in the securities granted or passed for such debt and debts; and retain all interest due and owing upon all such securities as he should so pay off and discharge, and apply the same to the further aid of the sinking fund: And that the treasurer should keep a separate account of the

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produce and amount of the rates and rents thereby granted, and to be received by virtue of the Act, and apply the balance thereof, after the retention of the several sums of money directed as aforesaid, in payment of the interest due, and to grow due, on the money so then due and owing, and thereafter to be borrowed, and in constructing and keeping up the said works, and increasing the sinking fund thereby required to be created. And that if there should be any surplus of the several sums of money so to be received by the corporation, under the Act of the 49 Geo. 3., or the Acts therein recited, as often as the same should exceed the sum of 500*l.* such excess should be added to the sinking fund, and be applied in like manner as the annual sum of 2000*l.*, until the whole of the sums of money then due, and thereafter to be borrowed, should be discharged.

The information further stated, that the corporation, in pursuance of the Act, levied sums of money to the amount of 114,865*l.* 9*s.* 3*d.*, which, with the rents for pipe-water, would have been sufficient to have answered all the purposes of the Act, and the several Acts therein recited. That the corporation were guilty of extravagance, and had charged 4000*l.* for each mile of metal-main laid down, which could have been done for 1500*l.* per mile: that they had omitted to keep up the sinking fund as directed by Act: that the debt ought to have been discharged by the sinking fund in 1826: that 2500*l.* was annually misapplied by the corporation, and the salaries of their officers unnecessarily increased: that the accounts of the rates had not been kept distinct, as directed by the

last Act: that the corporation had not passed the accounts of the rates; and had inserted in their accounts false and erroneous charges.

The information and bill prayed, that the Appellants, the mayor, &c. might be declared trustees of the rates and rents mentioned in the Act of the 49 Geo. 3. for the uses and purposes therein declared; and that the trusts thereof might be carried into execution: that accounts might be taken of all the monies received, &c. in respect of the rates or rents granted by the Act, and the application thereof, and of the expenses incurred in each year in laying down cast-iron or metal-main and service pipes, or otherwise making additional alterations and improvements in the works; and of the sums yearly applied towards the sinking fund, from the time of passing the Act; and of the debts yearly paid off; and of the money borrowed by the said corporation under the provisions of the Act, and then due on the credit of the rates thereby granted; and of the money applied to the payment of the interest of the debt of 67,800*l.*, and of the money so borrowed; and that the balance of the rates or rents, upon deducting the expense of laying down cast-iron or metal-main and service-pipes, or otherwise making any additional alterations and improvements in the said works, might be ascertained, and applied as directed by the provisions of the Act exclusively, &c.

The Defendants by their answer, filed Feb. 10. 1824, stated that the corporation, for many years, had been seised of the water-course as their private property; that by an Act 6 Geo. 1. c. 16. and 15 & 16 Geo. 3. c. 24. (Irish) the private interest of the corporation in the water-course was recognised,

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and that the corporation had laid out 200,000*l.* in the water-works before 1776: they denied that they were trustees for the public, and contended that the rates imposed by the 49 Geo. 3. were to continue until all monies borrowed under the Act were paid off: the corporation admitted receipt of rates amounting to 114,565*l.* 9*s.* 2*d.*; but they denied that the said funds, or any part thereof, had been improperly applied: that on the contrary, the corporation had accomplished as much of the works required by the Act of the 49 Geo. 3. as the funds received by them would enable them to do, consistently with the other purposes of the Act.

That up to the time of filing the information they had laid down metal-pipes through the city, to the extent of thirty-seven miles, four furlongs, and twelve perches, and that the average expense for each mile of metal-main did not exceed the sum of 1831*l.* per mile.

The cause being at issue, was heard before Lord Manners, then Lord Chancellor of Ireland, on the 22d of July 1824, when his Lordship was pleased to dismiss the information with costs.

The Respondents having appealed \* from this decision to the House of Lords on the 11th May, 1827, it was “ordered† and adjudged, “that the “decree complained of be reversed;” and after declaring the rights, accounts were directed to be “taken, and the monies to be applied in substance

\* See the report on the original hearing, *antè*, Vol. I. N. S. p. 312., where the information and bill, and the answer, &c. are more fully stated.


† See the order set forth at the end of the report of the case on the former hearing, *antè*, *quid suprà*.

“ according to the prayer of the bill ; and that the  
 “ said court do all such things as shall be necessary  
 “ to carry this order and judgment into execution ;  
 “ reserving to the said court the consideration of  
 “ further directions, and the costs of the suit, until  
 “ after the Master shall have made his report.”

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The order of the House of Lords having been received, and made the order and decree of the Court of Chancery, it was thereupon ordered and decreed, that the accounts and references thereby directed should be taken by William Henn, Esq., one of the Masters of the Court.\* On the 18th of September 1830, the Master made his report, finding, amongst other things, as follows :— That the Appellants, by their treasurer, received for and on account of sums borrowed under and by virtue of the Act of the 49 Geo. 3. c. 80. for the use of the said corporation, in the several years therein mentioned, commencing 20th May 1809, and ending 20th May 1827, the respective sums of money therein stated, and had made in the said several years the expenditures therein respectively specified ; and that the Appellants had received in the several years in the report mentioned, on account of pipe-water rates, the respective sums therein specified, and had applied the same in the manner therein stated : that the Appellants had borrowed upon the credit of the metal-main rents the sum of 32,000*l.*, which sum was secured by mortgages, or debentures.

\* Isaac Stewart, one of the relators, having died, an order was made that the Plaintiff might proceed in the cause, notwithstanding his death.

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tures, issued and framed in the form directed by the said Act: that the debt of 67,800*l.* in the decree mentioned consisted, first, of a sum of 19,100*l.*, raised in February 1809, alleged to be due to the Appellants for arrears of an annual sum of 1500*l.* allocated pursuant to an act of assembly of the corporation, made on the 11th day of January 1779; whereby it was resolved, that the sum of 1500*l.* annually be paid to the city treasurer, for the use of the city, in compensation for the several sums expended by them previous to the Act of the 15 & 16 Geo. 3. c. 24. upon the pipe water-works; secondly, of a sum of 37,000*l.*, raised at various times intermediate between the years 1776 and 1809, both inclusive, and charged on the funds granted by the several former Acts of Parliament, but for what particular purposes the Master was unable to set forth; and lastly, of a sum of 11,000*l.* raised in February 1809, for the purpose of purchasing ground for basins and reservoirs, and for the expenses in forming them: and that the said sums were secured by writings under seal of the corporation, called debentures: that a fund had not been provided, according to the direction of the Act of the 49 Geo. 3., for reducing and discharging the debt of 67,800*l.* and the sum of 32,200*l.* (making together 100,000*l.*), save as to a sum of 25,500*l.*: that the treasurer of the corporation had not annually, as directed by the Act, retained out of the rates and rents granted by the Act the sum of 2000*l.*, together with such sum and sums of money as would be equal to the interest on all such sum and sums of money as had been

borrowed under the provisions of the Act, and had not kept all such interest money as would become due and owing upon all such securities, sum and sums of money, as he or they ought to have purchased in, or paid and discharged, as directed by the Act; and that the corporation had not applied the same, from time to time, to the further aid of the sinking fund, in the same manner as the sum of 2000*l.*; and which sums, by them not applied as directed by the Act to be applied in aid of the sinking fund, amounted, on the 25th day of May, 1825, to the sum of 74,500*l.*: that of the sum of 74,500*l.*, a part, amounting to the sum of 24,941*l.* 10*s.*, was applied in the payment of interest due on the debt of 100,000*l.*, but which would not have so accrued, if the aforesaid directions of the Act, relative to the sinking fund, had been complied with; and that of the residue thereof, amounting to the sum of 49,558*l.* 10*s.*, a part, amounting to 39,000*l.* 3*s.* 3*d.*, was applied in the manner specified in the 6th schedule to the report annexed; but for which he had not given credit, conceiving that the Appellants were not properly entitled thereto under the decretal order; but how, or in what manner the residue thereof, amounting to the sum of 10,558*l.* 6*s.* 9*d.*, had been applied, he was unable to set forth: that no part of the interest money which became due and owing on all or any of the securities, sum and sums of money so purchased in, and paid off, as aforesaid, were or had been applied in aid of the sinking fund, by the corporation, or their treasurer, according to the directions of the Act; and that the treasurer of the cor-

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poration had not kept such separate and distinct accounts, as directed by the Act of the 49 Geo. 3., of the receipts and produce and amount of the rates and rents granted by the Act, and received under and by virtue thereof, from the passing of the Act, down to the 29th of September, 1814; but that on the appointment of the Defendant, William Henry Archer, as treasurer of the corporation, which took place in the year 1814, he commenced to keep such separate accounts from the 29th of September; and that he and the succeeding treasurer, had since continued to keep the same, as directed by the Act: that inasmuch as the treasurer did not retain the several sums directed by the Act, as before stated, he had not at any time in his hands such ascertained excess as was thereby contemplated, and therefore did not apply such excess as the Act directed should be applied in the manner thereby directed; but that the corporation did in fact from time to time, lay out and apply several sums in laying down cast-iron, or metal-main, or service pipes, and in making other additional works, to the amount, in the 1st schedule to the report mentioned: that various deductions had been made by the corporation from the rates or rents granted by the Act of the 49 Geo. 3., other than for collecting the rates or rents, namely, sums which they applied in payment of increased or additional salaries to officers and servants; salaries to newly created officers, and in payment of salaries to superannuated officers, and their widows and families, and such like purposes, amounting in the whole to the sum of 14,653*l.* 7*s.* 2*d.*,

and for which sums, though not admissible credits against the metal-main rates, the Master had given credit against the pipe-water rates and rents: that the said debt of 100,000*l.* had not been paid and discharged, by reason of the corporation not having retained and applied the several sums granted by the Act of 49 Geo. 3., in the manner by the Act directed, having taken the aforesaid metal-main and pipe-water accounts, in the manner directed by the Act; and the Master certified, that if the Appellants had complied with the several provisions of the Act of 49 Geo. 3., in the manner thereby directed, they would have had in their hands, in the several years thereafter particularly mentioned, excesses over and above the sum of 500*l.*, after the due expenditure of both rates and rents properly applicable to the sinking fund, and forming the fourth source provided by the Act, in aid of the fund: that by the operation of the sinking fund, if the same had been duly provided and applied as directed by the Act, the whole amount of the debt would have been fully paid off and discharged on the 25th of March, in the year 1825: that although the debt, and interest thereon, ought to have been paid off and discharged, and there ought to have been a balance of 1536*l.* 3*s.* 6½*d.* in the hands of the treasurer of the Defendants on the 20th of May, 1825, the Appellants had continued to levy and receive the rates and rents granted by the Act of the 49 Geo. 3. for two years longer, to the 20th of May, 1827: that the costs, charges, and expenses incurred in the preparing, drawing, and passing the Act of the

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49 Geo. 3., amounted to the sum of 1599*l.* 7*s.* 3*d.*, and that the same had been paid and discharged by the Defendants, or their treasurer, in the year 1809. The master further stated, that although the Appellants had failed to comply with the provisions of the Act of 49 Geo. 3. c. 80. so far as regarded the liquidation of the debt of 67,800*l.* and the sum of 32,200*l.*, borrowed under the provisions thereof, yet they had fully complied with the provisions thereof, so far as regarded the laying down metal-main and cast-iron service-pipes, inasmuch as on the 30th day of March, 1823, they had laid down metal pipes to the extent of thirty-two miles, five furlongs, and thirty-two perches, making on that day a total of fifty-five miles, four furlongs, and three perches; and in the month of June, 1827, the whole estimated length of fifty-six miles was completed, at which period the Appellants had remaining in their stores, metal-pipes sufficient to cover an extent of two miles, three furlongs, and three perches. And that the Appellants had since laid down the pipes so remaining in their stores, and also additional pipes, making a quantity in length, of seven miles and thirty-five perches over and above the length originally estimated of fifty-six miles, and which excess appeared to have been rendered necessary, by reason of the increasing extent of the city, several new streets having been built therein since the passing of the Act.

To the foregoing report, five exceptions were filed on the part of the Appellants:—

First, Because the Master had not allowed credit to the Appellants for the annual sum of 1500*l.* or any other sum whatever, for or on ac-

count of the annual income, rent, or allowance which had by long usage been appropriated out of the pipe-water rent, as and for a rent or allowance in respect of the estate of the corporation, in the watercourse, and in the works, and in part compensation for the several sums of money expended upon the pipe-water works previous to the 15 & 16 Geo. 3.

Secondly, because the Master had not allowed credit to the Appellants for the annual sum of 312*l.*, or any other sum whatsoever, as and for the interest on debentures, amounting to 5200*l.*, which had been issued before the passing of the Act of 49 Geo. 3., over and above the sum of 67,800*l.*, by the treasurer of the corporation, by whom it had been the uniform practice, since the Act of the 15 & 16 Geo. 3., that debentures should be issued on the credit of the pipe-water works.

Thirdly, because the Master had not credited as against the pipe-water rent, the sum of 1000*l.* per annum as and for a salary or an allowance to the lord mayor and treasurer of the corporation, and had only allowed and credited to the corporation in each year during the period, a poundage of five per cent. on the receipt of the pipe-water rents, though evidence was laid before the Master, that by an act of assembly passed in February 1809, it was, on the recommendation of a committee appointed by the corporation, for inquiring into the revenue of the corporation, and how the same might be increased, and its expenses lessened, resolved, that it would be much to the advantage of the corporation, to pay to the lord mayor and city treasurer, the sum of 1000*l.* annually, in lieu of poundage or agency, such sum appearing to be

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less than the sums payable to them for poundage on an average of the preceding four years ; and that in every year since the passing of the resolution, the sum of 1000*l.* per annum had been uniformly paid by the treasurer of the corporation to the lord mayor and treasurer, out of the pipe-water rents ; and that the same had been allowed by the corporation to the treasurer, in passing his accounts.

Fourthly, because the Master had found, that if the corporation had complied with the several provisions of the Act of 49 Geo. 3., in the manner thereby directed, there would have been in the hands of the treasurer, in the several years in the report mentioned, excesses over and above the expenditure of both the said rates and rent, properly applicable to the sinking fund, and forming the fourth source provided by the Act in aid of the sinking fund ; whereas, if the Master had allowed credit for the several sums in the 1st, 2d, and 3d exceptions mentioned, there would not have appeared any excess whatsoever over and above the sum of 500*l.* after the due expenditure of both rates which would have formed the fourth source in aid of the sinking fund.

Fifthly, because the Master had certified, that by the operation of the sinking fund, if the same had been duly provided and applied, as directed by the Act, the whole amount of the debt of 100,000*l.* would have been paid off and discharged on the 25th day of March, 1825 ; whereas, if the Master had introduced into the account the several sums in the 1st, 2d, and 3d exceptions mentioned, it would have appeared, that by the due operation of the sinking

fund, the debt would not have been paid off on the 25th of March, 1825, nor for a longer time afterwards.


Lord Plunkett, the Lord Chancellor of Ireland, having been Attorney-General when the information was filed, and the prosecutor therein, the cause was argued upon the foregoing exceptions, and upon the merits, on the 24th of May, 1831, and several other days, before the Master of the Rolls, who on the 7th of July, 1831, pronounced the following decree : —

“ That it appearing, as to the execution of the  
 “ works provided for under the statute passed in  
 “ 49th year of the reign of his late Majesty King  
 “ George the Third, intituled, ‘ An Act for the  
 “ ‘ better supplying the city of Dublin with water,’  
 “ that the said Defendants, the corporation of  
 “ Dublin, on the 30th of May, 1823, had laid  
 “ down metal pipes to the extent of thirty-two  
 “ miles, five furlongs, and eleven perches ; that on  
 “ the 27th of May, 1827, they laid down fifty-five  
 “ miles, four furlongs, and three perches of said  
 “ metal pipes ; that in the month of June 1827,  
 “ the whole estimated length of fifty-six miles had  
 “ been completed ; and that since that period,  
 “ they had laid down an additional seven miles  
 “ and thirty-five perches of the said metal pipes ;  
 “ and it appearing that the said Defendants, the  
 “ corporation, have not kept distinct accounts of  
 “ the pipe-water tax and metal-main tax, as di-  
 “ rected by the said Act, until the 29th day of  
 “ September, 1814 ; and it further appearing, that  
 “ the sum of 67,800*l.*, mentioned in the thirteenth  
 “ section of the said statute, and therefore charged

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“ by the Acts therein referred to, upon the pipe-  
 “ water tax and water-works in the pleadings  
 “ mentioned, and the sum of 32,200*l.*, borrowed  
 “ under the provisions of the said statute, have not  
 “ been paid off by the said Defendants, the corpo-  
 “ ration, by the application of the funds provided  
 “ for that purpose by the said statute, and directed  
 “ thereby to be so applied ; and that the sinking  
 “ fund created and appropriated by the said Act,  
 “ had not been applied by the said Defendants,  
 “ the corporation, pursuant to the provisions of  
 “ the said Act, and the trusts vested thereunder  
 “ in the said corporation, and that only the sum of  
 “ 25,500*l.* had been redeemed of the said sum of  
 “ 67,800*l.* and 32,200*l.*, making together 100,000*l.*,  
 “ and that a balance of 74,500*l.* of said 100,000*l.*,  
 “ consisting of said two sums, remains outstanding  
 “ and unpaid ; and it appearing that the said sum  
 “ of 100,000*l.*, consisting of said two sums, if  
 “ the provisions of the said statutes in that behalf  
 “ had been executed by the said Defendants, the  
 “ said corporation, and the funds duly applied  
 “ pursuant thereto, by the said corporation  
 “ would have been paid off on the 20th of May,  
 “ 1825, leaving a balance in the hands of the trea-  
 “ surer of the said Defendants, the said corpora-  
 “ tion, of 1536*l.* 3*s.* 6½*d.* ; and it appearing that the  
 “ said metal-main tax was continued for two years  
 “ after the same 20th of May, 1825, when it ought  
 “ to have ceased ; and that upon account of actual  
 “ receipts and payments of the said metal-main tax,  
 “ taken separately for the said two years, ending  
 “ 20th May, 1827, a balance of 7001*l.* 19*s.* 2*d.*  
 “ would appear in favour of said corporation ; and  
 “ in taking the said account for said two years, of

“ both the metal-main and pipe-watertax, and in-  
 “ cluding therein the said balance of 1536*l.* 3*s.*  
 “ 6½*d.*, and excluding therefrom the said interest  
 “ of 74,500*l.*, a balance of 14,986*l.* 9*s.* 5½*d.* would  
 “ appear against the said Defendants, the said  
 “ corporation:— It is declared by the Right  
 “ Honourable the Master of the Rolls, that the said  
 “ metal-main tax ought to have ceased on the 20th  
 “ day of May, 1825, and ought not now to be re-  
 “ sumed or continued; and that the relators, and  
 “ other owners and occupiers of dwelling-houses in  
 “ the city of Dublin, and suburbs thereof, and such  
 “ parts of the liberties of St. Sepulchre as are sub-  
 “ ject to pipe-water rents, ought to be exempt from  
 “ the further payment of any metal-main tax,  
 “ under the provisions of the said statute, passed as  
 “ aforesaid, in the said 49th year of the reign of  
 “ his late Majesty King George the Third, and  
 “ ought to be exonerated by the said Defendants,  
 “ the said corporation of the city of Dublin, from  
 “ any further or future liability to pay any tax or  
 “ sum of money imposed or enacted under the said  
 “ last-mentioned statute: And it is further ordered,  
 “ adjudged, and decreed, that the said relators,  
 “ and the said owners and occupiers of the said  
 “ dwelling-houses situate as aforesaid, ought to be  
 “ exempt from such liability, and ought to be ex-  
 “ onerated by the said Defendants, the said corpo-  
 “ ration, from such liability; and that the said De-  
 “ fendants, the corporation of the city of Dublin,  
 “ do and shall, within six months from the date of  
 “ this decree, pay off and discharge the said sum of  
 “ 74,500*l.* to the different persons who are holders of  
 “ the said securities or debentures for the said sum  
 of 74,500*l.*, and thereupon to procure the said

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“ holders to acquit and discharge the said securities and debentures: And it is further ordered, that an injunction do issue, to restrain the said Defendants, the said corporation of the said city of Dublin, from further collecting or levying the said metal-main tax from the said owners and occupiers of dwelling-houses situate within the said city of Dublin, and the said liberties and suburbs thereof, and such parts of the liberties of St. Sepulchre as are subject to the payment of pipe-water rents, or from any of them, until further order. And it is further ordered, that the said Defendants, the said corporation of the said city of Dublin, do pay the said relators the costs of this suit, to be taxed as between solicitor and client, save the part thereof which relates to the charges made in the information in this cause against the said corporation, which charge that the said corporation, in the small extent in which they had caused metal-main to be laid down, were not guided by the rules of economy towards the inhabitants of Dublin, but, on the contrary, were unnecessarily extravagant and unmindful of prudent management; and that they had charged the said inhabitants 4000*l.* for each mile of said metal-main laid down, and that they had not paid the same, or if they had, that it was extravagant, unnecessary, and an abuse of their trust; and that metal-main of the same materials and equal durability could have been had from respectable persons of the trade, at 1500*l.* per mile; and it appearing that no evidence has been given to support the said charges, it is ordered, that the relators do pay the said corporation the costs of that part of this suit, to

“be taxed as between solicitor and client; and it  
 “was further ordered, that the same be deducted  
 “from the said costs, as decreed to the relators;  
 “and accordingly, it was further ordered, that it  
 “be, and is hereby referred to William Henn, Esq.,  
 “the Master in this cause, to tax and ascertain  
 “the said costs, and to certify the balance: And  
 “it is further ordered, that the Rev. William  
 “Henry Archer, the executor of William Henry  
 “Archer deceased, do have his costs in this suit  
 “against the relators; and it is further ordered,  
 “that the relators do have the same over with  
 “the balance of costs, as decreed against the said  
 “Defendants, the said corporation; and accord-  
 “ingly, it was further ordered, that the said Plain-  
 “tiffs, the relators, may make up and enrol a  
 “decree with costs as aforesaid, for the perform-  
 “ance whereof the process of this Court is from  
 “time to time to issue, as in such cases is usual.”

This decree was enrolled in his Majesty's Court  
 of Chancery in Ireland, on the 1st of September,  
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The relators having furnished their costs,  
 amounting to a sum of 6671*l.* 1*s.* 8*d.*, (in which  
 were included several charges for costs of the  
 appeal before the House of Lords, to the  
 amount in the whole of 1610*l.* 6*s.*; also a sum of  
 1100*l.* charged as paid to one John O'Brien, an  
 accountant employed on the part of the relators,  
 for making out schedules, and accounts annexed  
 to the Master's report; and a sum of 17*l.* 1*s.* 3*d.*,  
 charged as paid to one Mr. Morgan, short-hand  
 writer, for taking notes of counsel's arguments, on  
 the hearing and the judgment of the Court; and  
 2*l.* for making copy thereof), William Henn, Esq.,

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the Master to whom the cause was referred proceeded on the taxation of the said costs; and on the 5th of December, 1831, certified, that pursuant to the decree in the cause, bearing date the 7th of July last, he had, in the presence of his solicitors concerned for the Plaintiffs and Defendants, taxed the said bill of costs between solicitor and client, so far as he conceived the same was properly taxable by him, to the sum of 3719*l.* 6*s.* 7½*d.* sterling; but that inasmuch as the bill included the costs incurred in prosecuting the appeal in the House of Lords, amounting to 1610*l.* 6*s.*, which costs he had not, as he conceived, any jurisdiction to tax, he had declined to tax those costs; and that as it appeared by the letters of William Courtenay, Esq., first clerk in the House of Lords, bearing date the 26th of August, 1831, and of J. S. Heptinstal, one of the sworn clerks in Chancery in England, for assisting the masters for the taxation of costs, bearing date the 22d of November, 1831, and addressed to Messrs. Forbes and Hale, the solicitors for the Plaintiffs in the conducting of the said appeal, that such costs were not properly taxable by any officer legally authorised, he, the Master, had allowed them as furnished; and which being added to the aforesaid sum of 3719*l.* 6*s.* 7½*d.*, amounted to the sum of 5329*l.* 12*s.* 7½*d.* And that he had likewise, in pursuance of the decree, in the presence of the solicitors, also taxed as between solicitor and client, the costs awarded by the decree to the Defendants, to the sum of 22*l.* 12*s.* 10*d.* And the Master further allowed to the Respondents, the sum of 600*l.*, part of the sum of 1100*l.* charged in the bill

as paid to John O'Brien, an accountant; the sum of 17*l.* 1*s.* 3*d.* charged as paid to Morgan shorthand writer; and the sum of 2*l.* for making fair copy of notes.

The Appellants conceiving themselves to be aggrieved by this taxation, and by the certificate of the Master, applied to the Master of the Rolls, for an order that the Master should revise and review his taxation of the costs certified by him, in respect of so much thereof as included and allowed as part of the costs payable by the Appellants, the costs incurred in prosecuting the appeal before the House of Lords; also in respect to the several charges made in the bill, for sums alleged to have been paid to John O'Brien, accountant; and also in respect of the sums of 17*l.* 1*s.* 3*d.* and 2*l.* The Master of the Rolls ordered the motion to stand over to Hilary term, in order that he might be satisfied upon certain inquiries which he intended to have made, as to whether the House of Lords, by their decree, gave, or intended to have given, the costs of the appeal.


In answer to inquiries directed by his Honor to be made upon that subject, his Honor was informed by an officer of the House of Lords, that the terms of the order of the 11th of May, 1827, referred only to the costs in the Court of Chancery, and were not intended to apply to the costs of appeal.

The motion having come on to be further heard, the Master of the Rolls made an order, bearing date the 25th of January, 1832, whereby, after reciting that it appeared to the Court, that under the decree in the cause, bearing date the 7th of July, 1831, the costs of the suit were therein de-

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creed to be paid by the Appellants, the corporation of the city of Dublin, to be taxed as between solicitor and client, for the purpose of indemnifying the relators from all costs and expenses necessarily and properly incurred in the cause, by reason of the balance of the trust-funds specified in the decree, found chargeable against the corporation, to and for the 20th May, 1827, namely, the sum of 14,986*l.* 9*s.* 5½*d.*; and that the balance of 14,986*l.* 9*s.* 5½*d.* was expressly recited in the decree, amongst the grounds thereof; it was declared, that the relators were entitled, by reason of the balance of the trust-funds, to be indemnified by the corporation for their costs and expenses necessarily and properly incurred in the suit, in taxing the same under the decree in the cause, as between solicitor and client, and, accordingly, that the Master's certificate was right, in including the costs and expenses of the relators in prosecuting the appeal, subject to the review thereof, thereafter ordered; and accordingly, it was further ordered, that the Master should review the items of the sum of 1610*l.* 6*s.* 6*d.*, and should, in reviewing the same, allow only such costs, disbursements, and expenses as were properly and necessarily incurred by the relators in prosecuting the appeal. And it was further ordered, that the Master should review the other costs specified in the certificate, in relation to the sums of 17*l.* 1*s.* 3*d.* and 2*l.* specified in the prayer of the petition; and no rule was made as to the rest of the application: And it was ordered, that as the question of the costs and expenses of the relators, and prosecuting the appeal, had not been raised or opened, either by the relators or by the corporation, upon the

hearing of the cause in the Court, when the decree, bearing date the 7th day of July, 1831 was pronounced, the relators and Appellants should respectively abide their own costs on the motion.

The Appellants complained of the decree of the 7th of July, 1831, and of the Master's report, in the following particulars, viz., that the Appellants had been thereby deprived of all credit in the account of pipe-water rents, during the several years for which the accounts had been taken, for the annual sum of 1500*l.*, being the annual income, rent, or allowance appropriated out of the said pipe-water rents, as and for a rent or allowance in respect of the estate of the Appellants in the said watercourse and works thereof, and as part compensation for the sums expended by them upon said works, previous to the Act of the 15th and 16th years of his late Majesty George the Third, and which had actually been so applied and allocated from the year 1779.

That credit had also been refused to the Appellants, out of the pipe-water rates, during the several years for which the Master had taken said accounts, for the said annual sum of 312*l.*, being the interest actually paid by the Appellants to the holders of debentures, amounting to 5200*l.*, which had been issued before the passing of the said Act of the 49th of his said late Majesty George the Third, on the credit of the said pipe-water works, over and above the 67,800*l.* in said decree mentioned, and was at the time of taking said accounts, outstanding and due to the holders of debentures.

That by the said decree and said Master's report, the Appellants had been refused credit out of

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the pipe-water rates for the sum of 1000*l.* per annum, during the several years for which said Master had taken said account, as and for a salary or allowance to the lord mayor and treasurer of said corporation, and have only been allowed credit for an annual poundage of five per cent. in the receipts of said pipe-water rents, though in fact, in every year since 1809, the said sum of 1000*l.* per annum had been uniformly paid to the said lord mayor and treasurer, out of said pipe-water rents.

That taking into consideration the credit to which the Appellants claimed to be entitled, there would not appear any excess whatsoever over and above the sum of 500*l.*, after the due expenditure of both said rates, which could form the said fourth source in aid of the sinking fund; nor could it appear, nor is it justly to be inferred, that by the due operation of the said sinking fund, the said debt would have been paid off on the 25th of March, 1825, nor for a long time afterwards.

That under the circumstances appearing in evidence, and detailed in the reports, costs, as between solicitor and client, ought not to have been awarded against the Appellants; and that in addition to those costs, which were decreed to be paid by the Respondents, the Appellants ought to have had their costs against the relators consequent upon the following charges in the said information, viz.: "That the Appellants, for the purpose of "making the balance appear to be in favour of "themselves, had introduced certain false and "erroneous items in their accounts, annually; "and that it appeared by the said books of the "corporation, and was the fact, that there were "contained false, erroneous, and improper charges,

“in the several years therein mentioned, of the  
 “several large sums therein mentioned, and  
 “amounting to the sum of 296,800*l.* 8*s.* 4*d.*,”  
 the said relators having wholly failed in proving  
 the same; and that under such circumstances,  
 no costs whatever ought to have been awarded  
 against the Appellants.

The Appellants also complained against the  
 order of the 25th of January, 1832, and the tax-  
 ation of the Master therein referred to, inasmuch  
 as no sum whatever ought to have been allowed  
 against the Appellants, for costs of the appeal to  
 the House of Lords.

The appeal was against the decree of the 7th  
 July, 1831, and the order of the 25th of January,  
 1832.

For the Appellants, Mr. *Pemberton* and Mr.  
*Tinney*.

The order of the 11th of May, 1827, con-  
 tained no directions to take any account of the  
 pipe-water rents; and even though it should be  
 conceded that such an account was authorised,  
 as incidental to those ordered, yet such account  
 ought to have been taken solely with a view to as-  
 certain whether there had been any excess over  
 the usual and actual expenditure out of the pipe-  
 water rents, such excess only having been in-  
 tended by the legislature to form a source of the  
 sinking fund, as should appear to be justly charge-  
 able as profits of the corporation, after all outgoings,  
 including, amongst others, a fair allowance for the  
 outlay of capital, and the value of property em-  
 barked in the pipe-water works.

It was not the intention of the order of the  
 House of Lords, nor of the Metal-main Act, to

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interfere with, or disturb, any disposition or allocation of the pipe-water rates, existing and sanctioned by usage previously to the passing of that Act, and consequently, the Master was not warranted in disallowing the annual sum of 1500*l.*, which had in fact been, since the year 1799, deducted out of the pipe-water rents, or considering that sum as forming any ingredient in such excess as was alone contemplated by the Metal-main Act as a source of the sinking fund.

The excess so contemplated, was such excess, if any, of the income from pipe-water rents, after the then usual and understood deductions from the same, as would be part of the general funds of the corporation, and applicable to its ordinary purposes, or the clear annual profit, after all expenses, including, amongst others, the said sum of 1500*l.* a year, as interest upon original outlay of capital and estate, and annual sum of 1000*l.* as expenses of collection.


The sum of 5200*l.*, on which the annual sum of 312*l.* was actually paid by the Appellants, was an existing and valid incumbrance upon the pipe-water rates at the time of passing the Metal-main Act, and the interest thereof formed a proper deduction from the receipts of the pipe-water rents, and therefore it was unjust and improper to disallow to the Appellants the annual sum of 312*l.* so paid.

The primary object of the Act of the 49 Geo. 3. was the securing a more ample and permanent supply of water to the inhabitants of the city of Dublin, and to prevent the frequent breaking up of the pavements of the streets of the city, for the purposes of repairing the pipe-

water works thereof; and although it appears by the Master's report, that the Appellants did not strictly comply with the provisions of the Act of 49 Geo. 3., so far as regarded the liquidation of the debt of 67,800*l.*, and the sum of 32,200*l.* borrowed under the provisions thereof; yet it is found by the Master, that they had fully complied with the provisions thereof, so far as regarded the laying down metal-main and cast-iron service pipes, and had not only completed the full estimated length of metal-main pipes, but had laid down additional pipes, making a quantity in length of seven miles and thirty-five perches over and above the length originally estimated, of fifty-six miles. And it is not stated in the report, nor could it be truly stated, that the Appellants could, by means of the metal-main rates, have strictly followed the directions of the Act relative to the sinking fund, and at the same time have continued to carry on the metal-main works; so that a literal adherence to the terms of the Act, as to the sinking fund, must have led to a sacrifice of the paramount object intended by the Act, that is, the laying down the mains.

The application of the metal-main rates, made by the Appellants, even supposing it not to have been sanctioned by a rigid construction of the statute, so far from having been fraudulent or *mala fide*, was, on the contrary, an honest and fair one, the consequence of it having been, that instead of having the debt of 100,000*l.* paid off, and the pipe-water rents (the Appellants' own property) left clear, and unencumbered, whilst the works would have been greatly protracted,

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or altogether stopped, and great delay and expense thereby caused to the citizens of Dublin, the Appellants have actually completed much more than the estimated quantity of mains, by which the public has been benefited, and have left the residue now due of the debt, a continuing charge upon their own income arising from the pipe-water rents.

The Court of Chancery in Ireland had no jurisdiction to decree or order that the Appellants should pay to the Respondents any sum on account of costs of the former appeal to the House of Lords; with respect to which costs, the House of Lords made no order on remitting the cause to that court.

For the Respondents, *Sir William Horne* and *Sir Edward Sugden*.

There is no ground for the objection that the costs of the proceedings in the House of Lords upon the former appeal, though not directed by the order of the House of Lords, had been allowed by the Master's report confirmed in the Court below. Where a bill is filed, and a decree made for an account, nothing is done as to costs upon the original hearing, but is reserved for further directions; the cause was remitted by the House to make a decree on the principle declared by the House. What was done in the House was, in effect, a proceeding in the cause; and this being a case of charity, according to the practice of the courts of equity, where there is a fund and no demerit in the Relator the costs, both direct and incidental, are given by the Court. That there is a fund is admitted, and it makes no difference in principle that it is outstanding. It would be paid

into court on application. The Relators and Plaintiffs by the information and bill have advanced the interests of the charity and increased the fund, and their expenses ought to be and in practice are allowed. They are not asked, as against the defendants, but out of the fund. Whether there would be a fund could not be known until after the appeal was heard, and the account directed to be taken, for which reason no directions were given by the House on that point. The House sitting as a Court of Equity will follow the practice of Equity and give costs to all parties out of the fund. This is the settled practice in cases of trust and charity where the parties have not been guilty of misconduct. The want of power, or practice, or officers of the House to tax the costs, is no impediment. It was not so considered in *Lord Rendlesham v. Woodford*\*, where upon a suit to set aside a will, the House referred it to the Court of Chancery to deal with the costs as they thought fit. So in *Atkins v. Wright*†, a question upon the construction of a devise as to what power the devisee had of cutting timber, on which depended the value of the estate, the judgment of the Court below was reversed, and upon a new bill filed on the same question, the decree in the new suit was reversed on appeal.‡ Nothing in either of the orders or the appeals was directed as to costs, yet the costs of both appeals were given by Lord Eldon after full argument on that point, and objections urged on the ground now taken by the Appellants. So in *Noel v. Lord Henley*§, where the order was “to do as seems just,” and on

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\* D. P. 23d Jan. 1825. MS. † D. P. 26th Mar. 1823. MS.

‡ D. P. July, 1823. MS. § D. P. 1823. MS.



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this direction the costs of the appeal were given. The case as to personal costs is different. If they are not given expressly by order of the House, they cannot be given to the Court below upon the remit. But where there is a fund, the Court having jurisdiction over the fund may give to all parties their full costs. The order is, that the Appellants retain their own, and pay the Appellants' costs out of the fund ascertained to be in their hands by the Master's Report.

Upon the merits it was argued for the Respondents, that according to the true construction of the pipe-water and metal-main Acts, taken in conjunction with the facts and circumstances of the case, the decree and order appealed from were right in refusing to allow the Appellants credit for the several annual and other payments sought to be obtained upon the exceptions and appeal.

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*Lord Brougham* : — This case was heard at great length in the course of the last session. The final determination was put off in consequence of doubts entertained by one of your Lordships\*, the late Chief Justice of the Common Pleas, who assisted in hearing the case, in which doubts I did not concur. If my noble and learned friend had still entertained those doubts, the best course would have been, that the case should be heard again by one counsel on a side, as it appeared to me highly desirable that the consideration of this case should not be further postponed. Great inconvenience has arisen, I may say great public inconvenience, in Ireland, from the delay which has taken place, and it is manifestly expedient that it should be no longer continued. I therefore in-


\* Lord Wynford.

tended to communicate with my noble and learned friend (who, from the unfortunately continued indisposition under which he has laboured, has not been able to attend here, and is not likely, as I understand, to attend before the Easter recess), in order to ascertain how far his doubts still continued, or whether they had been removed, I have great satisfaction in finding, by a letter which has been handed to me, that my noble and learned friend has reconsidered the case, and that those doubts which he formerly experienced, and which were the only ground for postponing the judgment, have been by further consideration removed, he now holds the same opinion which I have done from the first, and he authorizes me to state to your Lordships that he concurs in that opinion, which is in favour of the judgment of the Master of the Rolls.

My noble and learned friend makes a number of observations, which I shall mention to your Lordships to show how completely his doubts have been removed, though I do not wish to be understood by stating them, as entirely concurring in those observations. He says, "I now think that the judgment of the Master of the Rolls in Ireland is in every point right, and that the appeal should be dismissed with costs. I can find no legal origin of the right to the annual allowance of 1500*l.* claimed and taken by the corporation; I also think the corporation were not warranted in paying a fixed sum to the treasurer instead of a proper per centage on the sums received by him, and that they had no colour of a pretence for permitting their Lord Mayor to take 500*l.* a year, or any other sum out of the water-tax on the citizens of Dublin. Strike these

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items out of the account, and the debts provided for by the different acts would have been paid off at the period mentioned by the Master of the Rolls; but if the 1,500*l.* a year and the other items had a legal origin, the acts contain no provision for their payment, either out of the pipe-water or metal-main rates; on the contrary, a different appropriation of the money raised by them is expressly directed. The first account that we have of any right of the city of Dublin to the water, for the supply of the inhabitants, is in the 6th of G. 1., which we all know was a period of very great speculation. It appears that the corporation had then only a stream of water running through the city, and from which the inhabitants were permitted to supply themselves by pipes introduced into it at their own expense, or by any other means. This stream is described as having anciently belonged to the corporation, which is required by the statute to incur certain expenses for securing the supply and preserving the purity of the water. I think that although this stream is stated to be vested in the corporation, they only held it in trust for the benefit of the town. Corporations have been frequently made trustees of property, for the use of those who live within the limits of their franchise. The application of corporate funds for the preservation and improvement of this property was as proper as any use that could have been made of them. If such applications were more frequently made, we should have had fewer complaints of these bodies. Although this is stated to be an ancient right in the corporation, nothing appears to have been ever paid by the inhabitants of Dublin to the corporation for the

benefit which they derive from it. The first mention made of this rent is in a bye law made by the corporation on the 22d of January, 1799, in which it is said that no sums borrowed on account of the pipe-water revenue shall be appropriated to any other use, until they have discharged the sums borrowed on that credit, except the sum of 1,500*l.* annually paid to the Treasurer for the use of the city. It appears from this, that it was never paid antecedently to this period, and that this is the making of a new charge for the benefit of those who created it. Such a bye law, on every principle that is applicable to bye laws, is bad: it must be recollected also, that it was made after the 15 & 16 G. 3. had made a different appropriation of these funds. Let us now look at the statutes. The 15 & 16 G. 3., which is the most favourable to the corporation, authorises the raising of the pipe-water rents for the construction of new mains, and otherwise extending the water-works; and by the 11th section, the corporation are empowered to borrow upon the credit of the said rates and rents such sums as they shall find necessary for the purposes of this act. What right has the corporation to prejudice the creditors by a postponement of their payments, or by taking away any part of the sums specifically appropriated to their payment and the completing the water-works? It is expressly found, that had not the water-work rates been applied in satisfaction of the city claim, and to other purposes not sanctioned by the act, the debts would long since have been satisfied. The 49th of G. 3. makes this question perfectly clear. By the 11th section the corporation is empowered to borrow at interest

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upon the credit of the rates and rents granted by the said recited acts and of this act, money for the making reservoirs, and laying cast iron or metal-main and service pipes. Among the acts recited in the 49th of G. 3. is that of the 15 & 16 G. 3. By the 13th section of the 49 G. 3. all the money raised under all these acts is to be appropriated to the payment of the debt of 67,800*l.*, to pay 2000*l.* annually towards the interest of that debt, and of such sums as may be afterwards borrowed for the purpose of completing the works, and for the sinking fund for the reduction of these debts. By the 16th section it is enacted, if there be any surplus either of the money raised under this act or of the recited acts, the excess shall be added to the sinking fund above provided for. If the corporation had any claim for the 1500*l.* rent, or the 1000*l.* for the Lord Mayor, or a 1000*l.* for the treasurer, or the interest of the money raised by debenture, they should have asserted it at the time of the passing of this act, which now precludes them from claiming credit on these accounts against these rates in any court of justice.

I have stated already, that in every tittle of these observations on the construction of these acts, I do not entirely concur; but in the main I go along with my noble and learned friend in his reasoning upon them. There remains, therefore, no longer any material difference of opinion between my noble and learned friend and myself upon this subject; I do not know indeed that the difference went further than a doubt, but which doubt prevented my noble and learned friend from concurring with me in the opinion that the decree of the Master of the Rolls should be affirmed. I now,

therefore, move your lordships that the decree of the Master of the Rolls should be affirmed. It was a decree as a matter of form of the Court of Chancery, but substantially and properly it was a decree of the Master of the Rolls. But as all appeals come from the Master of the Rolls or the Vice Chancellor through the Court of Chancery, it becomes an appeal from the Great Seal on the signing of the decree by the Lord Chancellor previous to the appeal. This decree ought to be affirmed; and considering who the parties are, I move your lordships that it be affirmed with costs, the amount to be ascertained in the manner in which the amount of costs incurred is usually ascertained under the order of this House.

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*Lord Plunkett.* — Though I happened to be present at the time when this case was argued before your lordships, I took no part in the hearing of the cause, and I wish now to decline taking any part in the decision of it, because I had been recently before I quitted the bar, counsel in the cause. I think it right to mention that, lest it should be supposed that I differed in opinion from my noble and learned friends who have given their opinions on the case.

*Decree affirmed with full costs.*

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## ENGLAND.

(COURT OF CHANCERY.)

JAMES ACKERS (formerly called JAMES  
COOPS) an Infant, by NATHANIEL } *Appellant* ;  
CHARLES MILNE, his Guardian - }

SOPHIA PHIPPS, Widow - - - *Respondent*.

A. by his will, gave to his wife for her life, his messuage which he held for a term of ninety-nine years and his goods, and if she died before his estate and interest should determine, he directed that the messuage &c., should vest in his executors, and be applicable to the purposes after declared in his will, concerning his personal estate: he devised all his lands &c., and leasehold messuages &c., and all other his real and personal estate, upon trust as to the real estate, to repair and let the same, &c. and upon farther trust notwithstanding any limitation of uses or trusts thereinbefore mentioned, at their discretion to sell and convey the same, except the messuage &c. given to his wife &c., either in parcels for building upon, or otherwise improving the same, and upon rents for the benefit of his real estate, such rents to be held upon the same uses &c. And as to the money to arise upon such sales upon trust, to add the same to his personal estate, to constitute a part thereof. The will then as to lands &c. at W., gave them in trust for G. H., and also 7000*l*. to be conveyed and paid respectively to G. H. at twenty-one, but if he should die under that age, he directed that the lands &c. at W., and the 7000*l*. should sink into the residue of his real and personal estate, and go according to the disposition thereafter expressed. The will then proceeded as follows: "And as to the rest residue and remainder of my personal estate, not by this my will specifically disposed of, upon trust that my trustees and the survivor, his executors or administrators, do after payment thereof of my just debts, &c., and all sums necessary for the management and repairs of my real and personal estate, invest the overplus in

"the public funds &c., the resulting income or produce thereof, to be accumulated by way of compound interest, until J. C. shall arrive at the age of twenty-four years, and then upon trust to convey, assign, &c. to J. C. (upon his giving security &c. for the regular payment of the annuities thereinbefore bequeathed), all the legal estate and interest in all my freehold, copyhold, and leasehold messuages, lands, &c., and all other my real and personal estate and effects, not thereinbefore devised and bequeathed &c." The testator also directed that his trustees out of the income of his personal estate, should place J. C. at school, and give him an academical education at one of the universities of Oxford or Cambridge, and for that purpose, appropriate out of the income of the testator's personal estate, a sum not exceeding 800*l.* per annum, until he should attain twenty one years of age, and afterwards 1500*l.* per annum until he should attain the age of twenty-four. With limitation over in case J. C. should die without issue, before he attained the age of twenty-four.

Held that the benefit intended to be given to J. C. was the produce of a mixed fund of the real and personal estate of the testator, and that the rents of the real estate until J. C. attained twenty-four, did not result to the heir at law of the testator, as undisposed of, but passed to J. C. as part of the fund given in trust.

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**JAMES ACKERS**, by his will, gave and bequeathed unto his wife, Ann Ackers, for and during the term of her natural life, the use and enjoyment of his capital messuage, with the appurtenances, situate at Lark Hill, which he held for a term of ninety-nine years, free from the payment of rent &c., and also the use and enjoyment of all his household and other goods &c. And in case of the death of his wife, before his estate and interest in the said premises should determine, then he directed that the said capital messuage &c., and the household goods and chattels, should revert to, and become vested in his executors, and be applicable to



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the purposes of his will thereafter set forth concerning his personal estate: and then after bequests of money legacies, he gave and devised all and every his freehold and copyhold messuages, lands, tenements, rents and hereditaments, and moities, parts and shares of messuages, lands, tenements, rents and hereditaments, whatsoever and wheresoever situate, standing, lying, arising and being in the United Kingdom of Great Britain and Ireland, and also all and every his leasehold messuages, lands, tenements, rents and hereditaments respectively, and all other his real and personal estate and effects, whatsoever and wheresoever, not thereinbefore disposed of, unto Edward Hobson and Benjamin Williams, and their heirs and assigns, to the use, &c., upon the several trusts, &c., thereafter mentioned and declared concerning the same, that is to say, upon trust as to his said lands, hereditaments, and real estate, that they &c. should keep and continue the same in good repair and condition, and let, set, and manage the same, to and for the utmost benefit and advantage: and upon further trust, that notwithstanding any limitation of any of the uses or trusts thereinbefore mentioned, it should be lawful for them &c., at any time after his decease, to make sale of all or any part of his said lands &c. (except the messuage, garden, land and premises, devised to his wife for her residence and occupation during her interest therein, and also the land, hereditaments and premises thereafter given and devised to his godson George Holland Ackers and his heirs), and to grant and convey the fee simple and inheritance thereof to any person or persons whomsoever, either in parcels for building upon, or otherwise improving

the same, or at, upon, or under such yearly chief or other rent or rents, as to them should from time to time seem fit and expedient for the benefit of his real estate, at their discretion; and that the rents to be reserved upon such sales, should be vested in the trustees and their heirs, to the same uses, and trusts, &c. ; and subject to the same charges; a similar power was then given to the trustees to exchange and partition the lands devised, part of which were held in joint-tenancy with similar declarations, provisions, and trusts as to lands divided or received in exchange, and monies paid for owelty of partition thereinbefore or thereafter by him limited and declared concerning his real estate, and "as to the money to arise from such sale or sales, upon trust, to add the same to his personal estate, to constitute a part thereof:" And as to his personal estate, money in the public funds, and money out at interest, and securities for money, rents, arrears of rent, goods, chattels, and effects of what nature or kind soever not thereinbefore specifically bequeathed, he gave and bequeathed the same to the same trustees, their executors, &c., upon trust, to pay thereout to his wife, during the term of her life, an annuity of 3000*l.* with a further annuity of 200*l.* in case she should be desirous to quit and give up to the trustees the dwelling house and appurtenances before bequeathed to her for life. The will then proceeded as follows: "And as to, for, and concerning all my messuages, lands, and premises situate, lying and being in Wheelock in the county of Chester, purchased by me from Mr. Hillidge and Mr. Lockitt, they my said trustees and the survivor of them, and the

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heirs of such survivor, shall stand seised and be possessed thereof, in trust and to the intent and purpose to assign, convey and assure the same unto my god-son George Holland Ackers, eldest son of my nephew George Ackers, when and so soon as he my said god-son shall attain his age of twenty-one years: And also do and shall pay unto my said god-son George Holland Ackers the sum of 7000*l.* of like lawful money at and upon his attaining his said age of twenty-one years:—But in case my said god-son George Holland Ackers shall depart this life before he attains the said age of twenty-one years without leaving issue of his body lawfully to be begotten, then and in such case the said messuages, land and premises in Wheelock aforesaid, hereinbefore given and devised to him, together with the said sum of 7000*l.*, shall sink into and become part of the residue of my real and personal estate, and go according to the disposition thereof hereinafter expressed and contained: And as to the rest, residue, and remainder of my personal estate not by this my will specifically disposed of, upon trust that they my said trustees and the survivor of them, his executors or administrators, do and shall, after payment thereof of all my just debts, funeral and testamentary charges, and all annuities and yearly sums of money and legacies given by this my will, together with all such sum and sums of money as may be necessary for the management and repairs of my real and personal estate, to invest the overplus in the Parliamentary Stocks or Public Funds of Great Britain, or at interest upon Government Securities in England, to be altered and varied as they my said trustees or trustee shall think proper, and the resulting in-

come and produce thereof may be accumulated by way of compound interest until James Coops, son of Ann Coops (some time ago residing in Salford), and which said James Coops was born on or about the 4th day of August in the year 1811, shall arrive at and attain the age of twenty-four years, then upon trust that they my said trustees and the survivor of them, and the heirs, executors, and administrators of such survivor, shall convey, assign, transfer, pay and make over, by proper and effectual conveyances, transfers, payments, and assurances in the law, unto the said James Coops (upon his giving such security and executing such deeds and assurances to the satisfaction of the said trustees or trustee for the time being, or as their or his counsel shall devise, for the regular payment of the several annuities hereinbefore bequeathed) all the legal estate and interest of and in all my said freehold, copyhold, and leasehold messuages, lands, tenements, rents, and hereditaments, moieties, parts and shares of messuages, lands, tenements, rents, and hereditaments, situate in Great Britain and Ireland, and all other my real and personal estate and effects, subject to the life estate of my wife in &c.; and I direct that my trustees, &c. shall place James Coops at school, and afford him an academical education at one of the universities of Oxford or Cambridge, and for that purpose appropriate and pay out of the income of my personal estate such yearly sum as they &c. shall think necessary, not exceeding 800*l.* per annum, for his maintenance and education, until he shall attain the age of twenty-one years; and after that age, &c. do increase the allowance or payment of 800*l.* to an amount not exceeding the sum of 1500*l.* per

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annum, until the said James Coops shall attain the age of twenty-four years; and I hereby direct, that the said James Coops shall take, use, and bear the surname of Ackers only, in addition to his Christian name; but in case the said James Coops shall depart this life before he attains the said age of twenty-four years, without leaving issue lawfully begotten, then upon trust that they my said trustees, and the survivor of them, and the heirs, executors, and administrators of such survivor, do and shall, in like manner, assign, transfer, pay, and make over, by proper conveyances, payments, and insurances (subject nevertheless to the payment of the said annuities and yearly sums of money hereinbefore bequeathed, and also to the life estate of my said wife in my house and premises at Lark Hill), unto such son of the body of my said nephew George Ackers lawfully to be begotten, and hereinafter to be born (exclusive of my said god-son George Holland Ackers and his heirs), when he shall attain the age of twenty-four years, all that and those my real and personal estate, of what nature or kind soever; and in default of such son, in trust for the third, fourth, fifth, sixth, and all and every other son and sons of the body of my said nephew George Ackers lawfully issuing, and hereinafter to be born successively and in remainder, one after another, as they and every of them shall be in priority of birth and seniority of age, the eldest of such son and his heirs being always preferred, and to take before the younger of them and their heirs, such son and his heirs lawfully begotten nevertheless only to take when he shall have attained the age of twenty-four years: and my will and mind is, and

I do hereby direct, that any such son who shall so become entitled, upon his attaining his said age of twenty-four years, shall immediately take, use, and bear the name of James Ackers only; and in default of such, issue in trust for all and every the daughter or daughters and their heirs of my said nephew George Ackers, equally to be divided amongst them, if more than one, as tenants in common, and not as joint tenants, such daughter or daughters nevertheless only to take when she or they shall have attained the age of twenty-one years; and in case my said nephew George Ackers shall depart this life without leaving any such son or sons, daughter or daughters, hereinafter to be born, or that he, she, or they shall have respectively departed this life, if a son under twenty-four years of age, and if a daughter under twenty-one years of age, then upon trust for my said god-son George Holland Ackers, when and so soon as he shall have attained his age of twenty-four years. And I do hereby direct that my said trustees and the survivor of them, and the heirs, executors, and administrators of such survivor, do and shall pay and allow unto any son who may become entitled to my said real and personal estate under the dispositions and limitations of this my will, and who shall have attained the age of twenty-one years, any sum or sums of money not exceeding the sum of 1500*l.* per annum, such sum or sums of money to be paid and payable from his attaining the age of twenty-one years, until he attains the age of twenty-four years."

The will then provided, in case there should be no such son or sons, daughter or daughters, of his nephew, or that George Holland Ackers should die

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before attaining the age of twenty-four years without issue, that the trustees should hold upon trust, to divide the whole of his real and personal estate not thereinbefore disposed of among the children of his uncle Thomas Singleton, and his aunts Elizabeth Halsall and Ann Bayley, share and share alike, and to the heirs, executors, and administrators of such children respectively, with such limitations and in such manner as therein directed: he gave to Edward Hobson and Benjamin Williams each the sum of 500*l.* as a remuneration, &c., and he appointed them executors: and he granted the tuition and guardianship of James Coops during his minority to Edward Hobson and Benjamin Williams, and the survivor of them. The will was properly attested.

In 1831, the Respondent filed a bill in the Court of Chancery, stating the will as hereinbefore in part set forth, and a codicil thereto, by which a provision was made for Ann Coops (the mother of James Coops), and her children, except James Coops.

The bill further stated, that the testator James Ackers died on the 23d of May 1824, without having revoked or altered his will and codicil, excepting so far as the will was revoked or altered by the codicil, leaving at his death the Plaintiff in the suit (Respondent in this appeal) his heiress at law; and that George Holland Ackers in the will mentioned, a Defendant to the bill, was then an infant, and was the first son of the body of George Ackers in the will mentioned; and that the Appellant James Coops, in the will mentioned, a Defendant to the bill, was then an infant; and that the only child of the testator's late uncle Thomas Singleton, living at the time of the tes-

tator's death, was George Singleton, a Defendant thereto; and that the only children of the testator's aunt Elizabeth Halsall, living at the time of the testator's death, were John Halsall and Ellen the wife of Richard Mayor, Defendants thereto; and that the only child of the testator's late aunt Ann Bayley living at the time of his death was Ann Cottam, widow; and that Ann Cottam died on the 3d of August 1824 intestate, leaving four children, Jane, late the wife of William Nixon, Robert Cottam, her eldest son and heir-at-law, a Defendant thereto, Thomas Cottam, and Ann Dawson wife of John Dawson; and that Robert Cottam had obtained letters of administration of all the personal estate and effects of his mother out of the proper Ecclesiastical Court: and that Ann Ackers the wife of the testator died in the lifetime of the testator; and Thomas Ollier the elder before mentioned died in the lifetime of the testator; and that by a certain indenture dated the 14th of August 1824, made between Edward Hobson in the will mentioned of the one part, and Benjamin Williams a Defendant thereto of the other part, it was witnessed that the said Edward Hobson did absolutely decline and refuse to accept or take any estate, right, title, legacy, interest, trust, authority, or power whatsoever under and by virtue of the said will and codicil or either of them, as a trustee, executor, guardian, or otherwise of or concerning the freehold, copyhold, leasehold, real and personal estate of the said testator, and did absolutely decline and refuse to act in the execution of the trusts intended to be thereby in him reposed, and did wholly decline and refuse to act as executor of

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the said will and codicil or either of them, or as a guardian under the former; and the said Edward Hobson did, with the privity and by the acceptance of the said Benjamin Williams, absolutely and irrevocably renounce and disclaim to the said Benjamin Williams, his heirs, executors, administrators and assigns, all and every the freehold, copyhold, leasehold, and real and personal estate late of the said testator James Ackers, deceased, and given and devised or bequeathed by and comprehended in his said will and codicil, or either of them, or intended to pass thereby respectively unto the said Edward Hobson and Benjamin Williams, or either of them, as such trustees and executors as aforesaid, or otherwise howsoever.

The bill further stated, that on the 8th of October 1824, Benjamin Williams proved the will and codicil in the Prerogative Court of the Archbishop of York, and took upon himself the burthen of the execution thereof, and became the legal personal representative of the said testator: and that all the debts and funeral expenses of the testator had been paid by Benjamin Williams out of the personal estate of the testator, the personal estate being much more than sufficient for the payment thereof, and of the pecuniary legacies in the will mentioned: and that the testator James Ackers was, at the time of making his will, and thenceforward to the time of his death, seised and possessed of and well entitled to various lands, tenements, and hereditaments in fee simple and also various terms of years in certain lands in and about the township of Manchester and Salford, and in the adjoining township of Chorlton Row, jointly with Holland Ackers, deceased, and other

persons entitled under the will of Holland Ackers, in undivided moieties, as tenants in common, and which had been bought by the testator James Ackers and Holland Ackers, for the purpose of selling again in parcels for building thereupon: and that Benjamin Williams, upon the death of the testator James Ackers, accepted and took upon himself the execution of the several trusts reposed in him under and by virtue of the said will: and that Benjamin Williams, immediately upon the death of testator James Ackers, and in the pursuance of the trusts reposed in him by the will, entered into and had ever since been, and was then, in the possession and receipt of the rents, issues, and profits of the messuages, lands, and premises situate in Wheelock, in the county of Chester, and which were devised to Edward Hobson and Benjamin Williams in the will mentioned: and that Benjamin Williams, immediately upon the death of the testator James Ackers, and in pursuance of the trusts reposed in him by the will, entered into and had ever since been, and was then, in the possession and receipt of the rents, issues, and profits of all other the freehold lands, tenements, and hereditaments, situate and being in the kingdom of Great Britain and Ireland, and which were devised to Edward Hobson and Benjamin Williams upon trust to convey the same to James Coops when he should attain the age of twenty-four years, and upon the other trusts in the will mentioned: and that the rents received by Benjamin Williams in respect of the premises at Wheelock amounted to several thousand pounds, and the rents received by him on account of the other estates thereinbefore mentioned amounted to several thousand pounds:

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and the Plaintiff (the Respondent) by her bill insisted that she was entitled to the rents, issues, and profits of the premises at Wheelock from the time of the testator's death until the time at which George Holland Ackers should have attained his age of twenty-one years, and that she was likewise entitled to the rents and profits of the whole of the freehold estates of the testator, devised as before mentioned to the said James Coops, from the time of the death of the testator James Ackers until the time at which James Coops (the Appellant) should attain his age of twenty-four years: and the Plaintiff had applied to Benjamin Williams and requested him to account, &c., and prayed that it might be declared by the decree of the Court that the Plaintiff (the Respondent) was entitled to the rents and profits of the messuages, lands, and premises situate at Wheelock, from the death of the testator James Ackers until the Defendant George Holland Ackers should attain his age of twenty-one years; and that it might be likewise declared by the decree of the Court that the Plaintiff was entitled to the rents and profits of the hereditaments in the said will mentioned, to be devised to James Coops the Appellant, until such time as the Appellant should attain the age of twenty-four years, and an account, &c.

The Appellant and George Holland Ackers severally appeared, and severally filed general demurrers to the bill for want of equity, on the ground that the bill did not state any title to relief against them.

The demurrers were argued before the Vice-Chancellor in December 1831, who allowed the

demurrer of George Holland Ackers, but overruled the demurrer of the Appellant.

The order overruling the Appellant's demurrer, dated the 19th of December 1831, was signed by the Lord High Chancellor, and enrolled.

The appeal was against this order.

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For the Appellant, Sir *Charles Wetherell* and Mr. *Knight*.

It is to be observed that rents of leasehold, and even rents generally, are given in the same sentence with the bequests of personal estate. It is a mixed fund, and the trustees had the power at any time to convert the whole into personalty. The powers given to the trustees, and the charges upon the produce of the mixed fund, almost annihilate the freehold quality of the property as descendible to the heir, — even as to the Wheelock estate, which is excepted out of the general fund, and specifically devised. In the event of the devisee dying under twenty-one, that estate is to go to the trustees, and become part of the general consolidated fund of real and personal estate. The residue of the personal estate, which the trustees had the power to make as large as they pleased, is to be accumulated; and the accumulated fund, together with all such real estate as might remain unconverted by the trustees, is to be transferred to the Appellant at the age of twenty-four. In the face of these dispositions and the uncontrolled power of conversion given to the trustees, is it possible to argue that there was to be a resulting trust of the rents of the whole real estate until the Appellant should attain the age of twenty-four, the rents of which real estate so convertible were also charged

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with the annuity of 3000*l.* to the widow, and moreover were made applicable to the repairs of the chattel houses bequeathed by the testator, which might have exhausted the fund supposed to constitute this resulting trust? The direction to the trustees to make compound interest of the proceeds of the whole mixed fund equally furnishes a direct and necessary inference, that the rents of the real estate part of the fund was not to result to the heir. The annuity of 3000*l.* is to come out of various kinds of estate of a personal nature; but the word “rents” is comprised in the catalogue. The allowance to the Appellant for his university education (800*l.* a year) is to be paid out of the personal estate; but as the trust fund is constituted under the discretion of the trustees, no aliquot part of the charge can be taken out of any aliquot part of the fund, which is, according to the nature of the trust, mixed and general, especially by the express direction to make compound interest of whole profit of the aggregate fund. The property is to be raised as the trustees think proper, and the resulting produce thereof to be accumulated by way of compound interest.” It is clear, if possible beyond demonstration, that the rents of the real estate were intended to form part of the consolidated fund: the heir cannot claim them as property not disposed of. He could not prevent the exercise of the discretion by the trustees, and the produce of the real part of the fund could not accumulate with the personal as a mixed fund in the hands of the trustees if their power was so fettered. The word “real” must be implied in the clause for accumulation. The demise of the land to the trustees with such a

discretion and such power, is in substance a devise of the intermediate rents and profits. In another way also the trustees had power of diminishing the supposed interest of the heir to any extent short of annihilation for they might let the lands upon building leases, taking nominal rents and reserving the reversion. To displace the right of the heir, express declaration or necessary implication must appear. If expression is requisite to exclude the claim of the heir, it is to be found in the direction to apply these rents as part of the general fund to repairs of the personal estate. The trustees, by the express direction of the will, must annually take the rents into their hands and apply them according to the trust; this is irreconcilable with the supposition of a resulting trust for the heir. If it were not, therefore, direct expression, it is clearly necessary implication. So when the testator provides that "lands" taken in exchange shall be held upon the same trusts as the real estates devised, and the money to arise upon the sales of such estates upon trust to add the same to any personal estate to constitute a part thereof, if they are not words expressly disinheriting the heir, they do so by necessary implication.

The personal estate here as in other parts of the will seems, in the contemplation of the testator, to be the principal object in this mixed fund, which is one entire and indivisible. So the clause directing accumulation, if it is questionable whether it may be considered as an express disinheritance, undoubtedly furnishes the most inevitable implication that such must be the consequence.

It is seldom that authorities can be found appli-

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cable to the expressions and provisions of any particular will ; but there are precedents bearing strongly upon this case, particularly in respect of the rule arising from a mixed fund being vested in trustees, with charges upon it, and directions for management. In the case of *Gibson v. Lord Montford* \*, there was a devise of real and personal estate to trustees, their heirs and executors, for payment of annuities, &c., and as to the residue in trust for the children of A. when &c. they attain the age of twenty-one ; but if she should die without issue, then to B. &c. It was held that the intermediate profits passed by this residuary devise. In that case no such powers of sale or exchange, no directions to apply the produce of the mixed fund to repairs of leaseholds, &c. were given to the trustees, as in this case. But the gift of the residue of the real and personal estate was held to carry the intermediate profits of the whole fund, from the death of the testator to the time when the estate of the devisee vested in possession ; and the decision turned materially upon the fact, that it was a gift of a mixed fund ; establishing, in this respect, a rule which may be considered as general. Lord Hardwicke, in his judicial reasoning upon that case, relies much upon the circumstances of the gift being of a common fund, and that directions to accumulate are given as to a particular legacy, and in other parts of the will, from which he infers the same intent as to the residue. Here is no need of such inference, since the will contains the most express and elaborate directions for accumulation as to the whole mixed fund. Lord Hardwicke, in the case cited, seems to think that the devise of

\* 1 Vcs. sen. 485.

the residue of such a fund comprises in its terms a devise of the intermediate rents. "It is hard to say that the lord should be enabled to claim any thing out of it"—these are his words; and he adds, "He must claim it as undisposed of." He refers to the case of *Stephens v. Stephens*\*, a case sent by the Court of Chancery for the opinion of the Judges, upon a question of executory devise, who by their certificate, after having stated their opinion that the devise over to an unborn person at twenty-one was not too remote, conclude by saying, "As to the profits of the estate received since the death of William the grandson, or to be received until it shall vest in any person by force of the said executory devise, or shall go over to the remainder man, we conceive they belong to Sir T. Stephens, by virtue of the residuary devise in the will, as an interest in the testator's real estate not before bequeathed or disposed of by his will." In that case, at the date of the devise and the testator's death, there was no person in being who could actually take the rents, and the heir might with some plausibility have claimed them in the mean time, if the residuary clause had not been held to exclude his claim. In that case there was no trust for accumulation, and no limitation beyond that of the contingent executory devise. Here accumulation is directed, and other provisions made as to the rents. The Appellant was living at the date of the will, and there are many devisees over beyond him. In *Glanville v. Glanville*†, the residue of a real and personal estate was given to the son of the testator, to be a vested estate at twenty-one, and in case of his death under that age, to a daughter; the rents

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\* Forrester, 228.

† 2 Meriv. 38.



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of the residue of real estate and the interest of the residue of personal estate (after payment of annuities given by the will), to accumulate till the son attained twenty-one, or until his death. The same rule was established in this case. In the case of *Genery v. Fitzgerald* \*, Lord Eldon says, "The general principles are these: when personal estate is given to A. at twenty-one, that will carry the intermediate interest. If the testator gives his estate, Blackacre, at a future period, that will not carry the intermediate rents and profits. *But where he mixes up real and personal estate IN THE SAME CLAUSE*, the question must be, whether he does not shew an intention that the same rule shall operate on both. Here the property was partly real, partly personal, and partly of such a description that the testator does not seem to have known whether it was real or personal. He does not by his will create any trust, but makes a legal devise and bequest of the whole together. Then is not the weight of authority in favour of the proposition, that when real and personal estate are given in this way, the intermediate profits of BOTH must go together?" The main inducement to the decision of the Vice-Chancellor seems to have been founded on the direction of the will, that the Appellant, when he came into possession, should give security for the widow's annuity, which he construed a condition precedent, and held that it prevented the vesting. This is not perfectly intelligible: at most, it is only to be a concurrent act or fact. It is no condition; it is merely directory: the equitable estate vested in the Appellant from the death of the testator; and

\* Jacob. 468.

if it is a condition, it is precedent only to the conveyance of the legal estate by the trustees, which the Appellant might dispense with, and refuse to give the security required. The trustees might in that case retain the legal estate, but the equitable estate would remain vested in the Appellant.

The intent of the testator to be collected from the whole context of the will is obvious.

But the devise to the Appellant, in its direct terms, gives at least an immediate vested estate with future possession and enjoyment, subject to be divested upon a given event, which, according to all the authorities from *Boraston's case* downwards, carries the intermediate profits.

For the Respondent, Mr. *Tinney* and Mr. *West*.

It is argued for the Appellant sometimes, that the will is elaborately constructed ; at other times, that it is loosely and carelessly drawn, and that the testator did not know the difference between heirs and executors ; and to patch up their construction of the will, they are driven to the hypothesis, that the word "real" has been omitted in the clause for accumulation, from which so much inference is drawn to aid the construction. If this conjecture is sound, and the Appellant's claim is to stand or fall by it, then the judgment must be affirmed ; for it is a case of patent ambiguity : there is no evidence to support the allegation ; and if there were, it would be inadmissible. It is obscurely hinted, rather than openly argued, that this is a case of provision by a parent for a child ; and being so, courts of equity adopt the construction most favourable to the child. But a bastard has no paternity in the eye of the law ; and although it may

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be admitted that the rule extends to all cases where the testator assumes the character of a parent, yet here it can have no application, since the acknowledgment of such relationship is most studiously avoided throughout the whole context of this will.

The case against the judgment rests mainly upon the argument, that the testator, by his will, has vested the real and personal estates in the trustees in one inseparable mass, creating charges upon the common fund, and giving powers to the trustees which are incompatible with the supposition that he could intend that the intermediate rents in question should be separated from the body of the estate. But this is a view of the case resting upon false assumptions as to the words and provisions of the will; for the testator in every clause of his will has most carefully distinguished the several species of property, and the charges upon each. In one instance leasehold estates are treated as having the character of realty; but, with this single exception, no will ever was penned in which the distinction between real and personal estate was more carefully marked. His funeral and testamentary expenses and debts, the annuities given by his will, and the repairs of his real estate, are by several clauses directed to be paid out of his personal estate; directions which would be futile and senseless if, according to the hypothesis of the Appellant's counsel, the two estates are inseparably united. So, as to the rent of the mansion bequeathed to his wife, he directs it to be paid by his executors, that is, out of his personal estate; and as to the word "rents," occurring in the clause, enumerating particulars of the personal estate, no doubt the rents of the leasehold being

personal estate would be applicable to the repairs of the real estate, and rents due at the testator's death would go towards payment of the widow's annuity. The rents devised by the general bequest appear by the evidence to mean the chief rents, or fee-farm rents, upon building leases of which the testator was seised. Nor could they without this explanation, by any internal construction, be held to mean the intermediate rents in question.

The trust to keep the estate in repair by application of the proceeds of the freehold and leasehold lands, might justify the application of the rents to that purpose, but not to any purpose beyond this; and these repairs are afterwards directed to be made out of the produce of the personal estate. The clause giving power to the trustees to make sale of the real estate, supposing it to be arbitrary, has not been exercised; the existence of the power does not of itself convert the property; and what is not converted is not disposed of.

The testator himself provides as to that part which should be converted into chief rents, or into lands taken in exchange, that they should be held upon the same trusts. But, in truth, it is not an arbitrary but only a partial power for a particular purpose—expressly for the improvement of the real estate. An unlimited discretion may be given by a will; but unless it is so given, the trustees will be confined to the purposes expressed in the will. In *Cowley v. Hartstonge* \*, trustees not having

\* 1 Dow. 361., and *MSS. penes Aut.* See *Mortlock v. Buller*, 10 Ves. 309., *Lord Mahon v. Lord Stanhope*, in Chancery, 9th March, 1809. See also *Sugden on Powers*, 489., 5th edit.

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exercised a power to lay out money in land, Lord Eldon held that their discretion was at an end, that the Court must look to the intent of the testator; and upon that view it was considered as land.

As to the clause for accumulation which furnished the chief argument for the Appellant, it relates in express terms only to the personal estate, and they can only make it available by supposing an omission of the word "real."

The cases of a devise of real and personal estate, upon which the Appellant's counsel rely as ruling this case are all clearly distinguishable. The general law as to real estate not disposed of is settled by *Acroyd v. Smithson* \*, in favour of the heir. In *Genery v. Fitzgerald* † the rule is introduced that if a mixed residue is given, the same intent must be presumed as to both funds, since they are given without distinction by the testator. But if you can find a clear distinction in the will itself, as to the funds, that rule will not apply, and, as already shewn the distinction of the funds, by the distinct charges upon each fund in this will, makes them beyond controversy separate and distinct. The general law must therefore be applied.

The words, "all other my real and personal estate," at the end of the clause are mere words of course, having no operation against, nor affecting, the disposition in the preceding part of the clause for accumulation as to the residue of the personal estate, and therefore not aiding the argument to shew an intent to unite and give the same destination to the real as to the personal estate within the rule as laid down in *Genery v. Fitz-*

\* 3 B. C. C.

† Jacob. 468.

*gerald*, especially where other parts of the will shew so clear a purpose of distinction between the respective estates.

The case of *Stephens v. Stephens*\* is by necessary implication an authority for the heir-at-law. There was a contingent gift to the devisee under which it was held that the intermediate rents did not pass. But there was also a residuary gift which did pass the rents. In this case there is a contingent but no present vested residuary devise. The contingent gift is the only gift. The case of *Gibson v. Lord Montford*† is specific and peculiar in the structure and expressions of the will, and wholly inapplicable to this case as an authority. In the first place, the residue of the real and personal estate is united for all purposes; there is no distinction by separate charges as in our case. Then certain annuities being charged and made payable out of the common fund, it is provided, if they fail, that they shall fall into the residue constituted of that mixed fund which is united by the remainder; and the annuities being payable in part out of rents of the realty which is a portion of the mixed fund, there is, in effect, an implied if not a direct gift upon contingency of part of the rents of the real estate to those remainder men. The intermediate rents, therefore, in that case so far from being undisposed of, as in this case, are expressly to the extent and proportion in which they contributed to the payment of the annuities given away from the heir, and part being given—if this is not a plain direction as to the whole,—it is an implication which follows as a more necessary consequence than under the gift of the mixed fund,

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\* C. T. T. 233.

† 1 Ves. Sen. 490.

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in *Genery v. Fitzgerald* that the intent must have been to give the whole of both the united funds to the devisee of a portion of the fund. This is the true ground of the decision, in *Gibson v. Lord Montford*, not, as erroneously supposed, the mere union of the real and personal estate. For even in *Genery v. Fitzgerald* Lord Eldon most carefully fences the rule by this qualification, that the fact of the union ought to put the judge upon inquiry, by consideration of after parts of the will as to the intent of the testator in respect to the intermediate rents apparently and *primâ facie* undisposed of. In our case there is no such solid ground on which to build the inference, as in *Gibson v. Lord Montford*.

In the case of *Popham v. Lord Aylesbury* \* the devise was of real and personal estates to trustees, by sale or mortgage, to pay debts and legacies in default of personal estate, and subject thereto in trust for B. his heirs, executors, &c., in case he should attain twenty-one, and it was held that the intermediate rents were not undisposed of, but were applicable after payment of legacies and the interest of debts to sink the principal of the debts. This decision appears to have no bearing upon the present question. The will in the case of *Glanville v. Glanville* † provided, that the legacy should be a vested interest in the legatee at the age of twenty-one, and the Master of the Rolls, was of opinion that there could not be two periods of vesting, and by fixing one the testator excludes the other. The intermediate rents, therefore, were directed by the decree to be accumulated, until the plaintiff attained twenty-one or died under that age. But, moreover, in that case the devisee was the

\* Amb. 68.

† 2 Mer. 38.

heir-at-law, and by numerous authorities it is established, that where an interest is given to the heir at a certain time, it is by plain implication a gift from him until that time. As where an estate is given to A. after the death of B., if A. is the heir-at-law, there is by implication a gift to B. for his life. But if A. is not the heir-at-law, there is no disposition of the estate.

*Nicholls v. Osborn*, and *Taylor v. Johnson*, cited in *Glanville v. Glanville*, are cases of personal estate only. In *Montgomery v. Woodley*\*, there also cited, there was first a series of direct limitations, and then a clause directing that none of the devisees should be put in possession until they attained the age of twenty-five. It was argued that this was a revocation of the former gift, and that the property was in the mean time undisposed of. But the Court was of a different opinion. Nor is there in the will in *Glanville v. Glanville*, any appropriation of the intermediate profits of the personal estate, shewing a distinction, as in our case, between the real and the personal estates.

But suppose the Appellant had died under the age of twenty-four, to whom would the intermediate rents have gone? Not to his representative, as they must argue, but with the general residue, to the next in remainder; and if so, the gift is contingent and not vested; and if the residuary clause carries the intermediate rents of the Appellant's estate, it must also carry those of the estate given to George Holland Ackers, which would leave him without provision or maintenance. The case as to that clause cannot consistently be argued upon any other footing. But this is clearly repugnant to the

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\* 5 Ves. 522.



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intent of the testator, and the express provisions of his will.

As to the argument that the words of this will, in the limitation to the Appellant, give a vested interest, without aid in construction from the other clauses of the will, the authorities are misunderstood; for in all of them, except *Stanley v. Stanley*, there is a direct gift: whereas here there is no gift, but only a direction to convey, and that upon condition. In *Stanley v. Stanley*, the Master of the Rolls thought the question of vesting not material, and in the appeal by G. H. Ackers, a serious question may arise, whether *Stanley v. Stanley* was rightly decided. But if G. H. Ackers, upon the direction to convey to him, at his age of twenty-one, took only a contingent interest, it must be clear beyond question that the Appellant could take no more; for in the former case as in *Stanley v. Stanley*, the direction to convey is absolute, and not, as in this case, conditional, or to be accompanied by an act to be done by the devisee. It is said that there is a good devise of the equitable interest, but where is it to be found except in the direction to convey. It is said that the direction to convey is a form: so it might be if there was otherwise a devise giving a vested estate, and the trustees might be compelled to convey: but there is no such gift, and they are not bound to convey; nor will any estate vest in the Appellant until he does the act which is to precede or accompany the conveyance. If the trustees had converted the whole property into money, the same act was required before the money should be transferred. It is a reasonable condition—an act which the trustees are bound to require and see performed before they

vest the estate by the conveyance. In *Stanley v. Stanley* there was no act to be performed, and the trustees might be bound to convey as directed, whether the estate vested was there held immaterial. The case was disposed of on other grounds: here the conveyance could not be made without a breach of trust unless the act were performed, and there is no gift or estate without the conveyance. The gift is in and by that conveyance, and upon the performance of the act, which operates as a condition precedent, or, concurrent.

These questions as to vested and contingent interests, and the disposal of intermediate rents and profits, were most fully and elaborately argued in the case of *Duffield v. Duffield*.\* There was a gift to A. on his attaining the age of twenty-one, and taking the name of Elwes. The main question was, whether this was a vested or contingent interest? and it was eventually held, upon the opinion of the Judges, and reversing the judgment of the Vice Chancellor, that it was contingent, and in effect principally upon the ground that the attaining the age and taking the name must precede the vesting of the estate.

The following authorities were also referred to in argument chiefly on the questions of vesting, condition precedent, the conversion of real into personal estate and resulting trusts, *Durour v. Motteux*, 1 Ves. Sen. 320.; *Mallabar v. Mallabar*, Forrest 78., on resulting trust for the heir; *Whitmore v. Weld*, 2 Chanc. Rep. 173.; *Acroyd v. Smithson*, 1 Bro. C. C. 512.; *Digby v. Legard*, cited in *Cruse v. Barley* 3 P. W. 19.; *Amphlett v.*

\* 3 Bligh, N. S. 260.

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*Parke* 2 Russ. & M. 221.; *Aston v. Harvey*, West's Rep. p. 350.; *Johnson v. Castle*, Winch 116.; *Wright v. Horne*, 8 Mod., 5 Vin. Abridg. 343. condition; *Acherley v. Vernon*, Willes' Rep. p. 153.; *Doe v. Lea*, 3 T. Rep. 41.; *Roundell v. Curren*, 2 Bro. Ch. Ca. 67.; Grant's case, *Bullock v. Stones*, 2 Ves. 521.

*Lord Brougham*.—James Ackers, being seised of real, leasehold, and personal estates in the county palatine of Lancaster and elsewhere, by his last will, among other things, and after other devises and bequests, devised certain leasehold premises and personal chattels to his wife for her life, directing that the interest therein unexpired at his decease, together with the personal chattels, should “revert “to and become vested in his executors, to be “applicable to the purposes of the will, afterwards “set forth as to his personal estate;” and he then gave and devised, by the most ample words, all his real and personal estate whatsoever and wherever situated, to trustees, whom he also appointed executors and guardians of James Coops Ackers the Appellant, and their heirs and assigns for ever, upon trust as to the real estate, to keep it in repair, and to make sale, and absolutely dispose of or let on reserved rents, or exchange for other lands, or for partly other lands, and partly money, all or any part or parts of the said real estate, except a small parcel, the subject of the other appeal,\* and except the part devised to his wife for life, and the money got or rents raised on such sale, lease, or exchange, was to fall into his personal estate. He then declares the trust as to the estate

\* *Phipps v. Ackers*, heard next after this Appeal, not yet decided.

of Wheelock, the subject of the other appeal, to be to George Holland Ackers when he shall attain twenty-one, together with 1,000*l.*; but in case of his decease before, without issue, both the one and the other are to become part of the real and personal estate, and go according to the *disposition* (in the singular) after made; and as to the residue of the personal estate not specifically disposed of, the trusts are, to repair the real as well as personal, meaning of course the leasehold, and to “vest the surplus and accumulate it by way of “compound interest for James Coops Ackers “(who appears to have been his natural son) “until he arrives at twenty-four;” and then upon trust to convey, assign, and transfer, by proper and effectual conveyances, transfers, and assurances, to James Coops Ackers “(upon his giving such “securities, and executing such deeds and assurances as the said trustees or trustee for the “time being, or their or his counsel, shall devise “for the regular payment of the several annuities “hereinbefore bequeathed), all the legal estate “and interest of and in all my said freehold, “copyhold, and leasehold messuages, lands, tenements, rents, and hereditaments, moieties, parts, “and shares of messuages, lands, tenements, rents, “and hereditaments, situate, standing, lying, arising, and being in the United Kingdom of Great Britain and Ireland, and all other my real and “personal estate and effects whatsoever and where-soever, not hereinbefore given, devised, and bequeathed; subject nevertheless to the life estate “of my said wife in my said capital, messuage, “dwelling-house, garden, land, and premises, and “the household goods and chattels thereto apper-

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“taining and belonging.” And the question decided in the Court below and now brought by appeal before your Lordships, is, whether or not this devise gives the intermediate rents and profits growing due, and of which perception has been had by the trustees previous to the period of majority prescribed to James Coops Ackers the Appellant. His Honor having decided that these rents go to the heir-at-law as undevised, and that the gift to James Coops Ackers was contingent.

Upon the general principles which are to rule this case, there is no doubt: they are recognised in all the cases, and not disputed in any, even where the particular circumstances are understood to preclude their application; nor do I understand them to be now brought into controversy, except, perhaps, in one part of the argument upon the other appeal; indeed, they are so clear that they require no defence. The heir-at-law takes through no intention of the testator, but paramount the will, independent of it; or as it has sometimes been expressed, and not very correctly, against the will. This is quite plain; it is indeed only saying, he takes as heir, and not as purchaser. But from this it follows that he has no occasion at all for arguments upon construction, or to indicate and ascertain intention in his favour. These arguments belong to the party who would displace him, and by means of the intention expressed, defeat his claim. Nor can he be so displaced and defeated except by direct words or plain intention; an expression which I prefer to necessary implication. There must appear to be such an intention to exclude him, as to leave no reasonable doubt on the mind of the Court that it existed in the mind of the testator,

and it will manifestly not be sufficient that from the general circumstances and situation of the party, or even from the general aspect of the instrument, we may have no moral doubt of how the framer of it would have answered the question had he been asked to declare his meaning, for this would let in every case of plain omission, by mistake, and of gift by inept words, or in contravention of the rules of law. The words used in the will must be sufficient according to their legal sense, and within the rules of law to indicate the intention; there it is chiefly that the authorities aid us, and indeed control us; for these have in this, as in so many other branches of the law respecting devises and bequests, given a certain weight to certain provisions; that is to say, the courts have held these provisions as so strong to indicate intention, that a rule of construction may be said to have been adopted, and when we find such provisions we are not at liberty to say the intention did not exist, unless the other parts of the instrument are sufficient to rebut the inference.

Now it is impossible for me to look at the cases decided both at law and in equity, without feeling that great force has been given to general gifts of all the residue real and personal. The Court of Common Pleas, while it possessed such lawyers as Mr. Justice Heath and Mr. Justice Wilson, held such a gift to be strong enough to pass real estate, though accompanied with limitations utterly inapplicable to any but personal estate, *Doe v. Chapman*, 1 H. B. 223. : and the same was afterwards held in *Smith v. Coffin*, 2 H. B. 444. ; a doctrine extended in *Morgan v. Surman* \* (when Sir J. Mansfield was in that Court), so as to com-

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\* 1 Tan. 289.

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prehend estates not in the contemplation of the testator. But this principle is general, and will not carry us a great way. The view taken of a mixed residuary gift in *Gibson v. Montford*, 1 Vesey sen. 489. is of great importance. I have seen it commented upon by some very able text writers, as if Lord Hardwicke had there considered that a residuary gift of real estate by way of executory devise, and to a person not in *esse*, or to a person in *esse*, but to take only at a future time, carried the rents and profits of the estate during the intermediate time. This is certainly not the gist of the decision, which proceeds upon the whole circumstances of the case, and particularly on the devise being to the trustees in fee, and on the gift being of the residue of all the estates real and personal. But in one part of his elaborate judgment, p. 490., he says, "It is pretty hard to say that *in any case* where one devises all the rest and residue of his real estate, the heir should be enabled to claim any thing out of it, for how can he claim or take these intermediate profits? He must claim them as part of the real estate undisposed of." But he afterwards dwells upon the residuary devise of all estate personal as well as real. Let us, however, in passing remark, although this is quite unnecessary for disposing of the present question, that it does seem difficult to understand a residuary devise even when confined to real estate, in any other than this general and absolute sense. For what can it mean but to give away from the heir whatever had not before been given away from him? In some of the cases discussion has arisen as to the words "not before given," or "not otherwise disposed of;" but these are im-

plied in "rest, residue, and remainder." Then suppose I give my estate of Blackacre to A., and then give to B. my other real estate, not already or otherwise disposed of, "to be taken by him at "twenty-one, or when he arrives at       ;" surely this includes not merely the *corpus* of my estate of Whiteacre, but the intermediate rents of it, because these are parts of the real estate not otherwise disposed of. This appears clearly to have been Lord Hardwicke's opinion, and I know of no case in which it has been overruled, though it is said to be inconsistent with *Bullock v. Stones*,\* of which I shall presently speak.

But *Gibson v. Montford* is certainly of peculiar authority. There is hardly any one of the same eminent person's judgments more laboured, and he felt strongly the difficulties of construing the will, for he begins by saying that it looked as if the testator (Mr. Shephard) had been minded to raise all the questions touching executory devises and devises in trust, which he could on such an instrument. The part, too, which occupies by far the greatest portion of the judgment is the one here in question. Lord Hardwicke at great length shews that the trustees took a fee in the estates devised; and he then refers fully to the case of *Stephens v. Stephens*, and to the concurring opinion of the courts of law and equity; of himself, when sitting in the Court of King's Bench, and of Lord Talbot and Lord King, that an executory devise of all the rest and residue of an estate real and personal, takes in the intermediate profits of the real estate so devised upon contingency. He then states that the only difference between *Stephens v. Stephens* and the case at bar was, that the devisee was in

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*esse*, which he agrees made it stronger. But he still holds that case sufficient to decide the one in hand. However, he adds that it does not rest there; for the blending of real and personal estates in the same residuary clause, the surplus of the personal being on all hands admitted to pass, is a strong argument against a resulting trust to the heir-at-law, and that Lord King laid great strength on this in *Rogers v. Rogers*.\* He further relies on the disposal of the annuities as furnishing new indications of the intention to exclude the heir. These, which were to be paid out of the real estate, in case the personal proved deficient, were ordered to fall into the residue as the lives fell in.

I have preferred a reference to the important cases of *Stephens v. Stephens*, and *Rogers v. Rogers*, in the words and with the remarks of such a commentator as Lord Hardwicke, rather than going at once to the books. But taking them into view, and especially considering the decision of Lord Hardwicke in *Gibson v. Montford*, I remain without any doubt at all upon the case at bar. But *Stephens v. Stephens* requires an observation further. The folio edition, Forrester's Cases, Temp. Lord Talbot was published before 1750, when *Gibson v. Montford* was decided; and yet it is observable that Lord Hardwicke there speaks of Lord Talbot's opinion as known to him only by rumour, whereas it appears from Forrester, p. 228, that Lord Talbot expressed his satisfaction with the certificate of the King's Bench, and said he hoped it would for the future be a leading case in the determination of all questions of this kind. The main point no doubt in the case sent, and in the certificate returned, was the

\* 3 P. W. 193.

question then held not sufficiently decided, notwithstanding *Taylor v. Bydall*, upon an executory devise to a person unborn on his attaining twenty-one. But the whole matter was sent to law, and a distinct opinion is given that Sir Thomas Stephens took the interest in the intermediate rents and profits not before bequeathed and devised by virtue of the residuary gift in the will.

But the Filecutter's case (*Bullock v. Stone*, 2 Vesey sen.) is cited, as leading to another view. I shall first remark upon it, that some of the circumstances are wanting there which occurred in *Gibson v. Montford*, and which occur here. Next, reliance was there placed in the argument at the bar upon the relation in which the devisee, the unborn son of the filecutter, stood to his father. Thirdly, the judgment only gives the filecutter (who was heir-at-law) the rents and profits until the son comes in *esse*, and then gives them to the son; at least this is the plain meaning of the judgment, though it is very inaccurately given, Lord Hardwicke being made to say, "I am of opinion that the interest in the intermediate rents arising to the heir-at-law, will determine upon his having a son, for that son's education is to come out of them;" and he adds, "the son whom the testator has instituted as heir, shall have the benefit of these rents and profits from the time of his birth, at least so far as his conduct is concerned, and what the surplus will be does not appear, probably nothing." The utmost then that can be said as to the surplus untouched by the special direction respecting maintenance and education, is that the judgment avoids disposing of them. But that

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which totally distinguished the filecutter's case from *Gibson v. Montford*, and from the present case is, that it is not the case of a general residue at all: it is only a gift of the "real and personal estate at Ashgate." By this must be intended the real estate at Ashgate and the personal estate there, or the personalty connected with the realty; and it looks as if it had been leasehold. Now no one maintains that a devise to A. when born, or when he attains twenty-one, of the estate of Blackacre, will convey the intermediate rents. That is a known and admitted distinction between a devise of real and a gift of personal estate, to vest in possession at a future time.

*Genery v. Fitzgerald*, was decided by Lord Eldon upon an appeal from the Rolls, and he was so clear on the point that he stopt the respondent's Counsel. *Bullock v. Stone*, was cited by the Vice-Chancellor, who argued it for the appeal, as was *Gibson v. Montford*. His Lordship therefore had the whole before him, and after admitting the distinction between real and personal gifts, to which I have adverted, he says, "When a testator mixes "up real and personal estate in the same clause, the "question must be whether he does not show an "intention that the same rules shall operate on "both." It must be further remarked that this was a direct gift to the devisee, and not a fee limited first to trustees. Now Lord Hardwicke must have deemed that an important feature in *Gibson v. Montford*, for a great part of his argument is employed in demonstrating that the trustees took a fee; and accordingly reliance was placed on the difference between the two cases, by the Vice-

Chancellor arguing on the Appellant's behalf in *Genery v. Fitzgerald*. Nevertheless Lord Eldon was quite clear that the blending of real and personal in one clause was sufficient, and affirmed the judgment of the Master of the Rolls, although the fee previously given to the trustees did not exist in that case, on which Lord Hardwicke thought so much turned.

The case before us has all the circumstances which occurred in *Gibson v. Montford*, except that of the annuities directed to fall in; and it has other circumstances fully as strong as that was, which did not occur in the former case. It is also distinguished by the circumstance adverted to by Lord Hardwicke to have some weight, of the gift being to a person in *esse*, as it was in *Stephens v. Stephens*. There is a devise to trustees in fee not proved by implication or made out by reasoning, but in the most express and apt terms to convey a fee. There is the power of exchange and sale of all or any part of the real estate, the price to fall into the residue, and go from the heir. There is the direction for the repairs of the leasehold out of the general fund. There is the accumulating of the personalty and compound interest directed, and before any direction is added as to who shall take this, there comes the general gift of the real and personal estate not otherwise given; so that though no direction is given as to accumulating the income of the real estate, yet the accumulation of the personal income is only given under the same clause which gives the residue of the real estate. The word "*disposition*" is used in the singular, indicating clearly that it was all one provision or gift, real as well as personal.

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There remains then no doubt whatever that this case is at least as strong as *Gibson v. Montford*, perhaps stronger; that it is stronger than *Genery v. Fitzgerald*; that it does not at all come within the principle of the filecutter's case; and that therefore the circumstances indicate plainly an intention to displace the heir-at-law, with respect to the intermediate rents and profits.

I do not at all consider this doctrine recognised in *Stephens v. Stephens*, *Gibson v. Montford*, and *Genery v. Fitzgerald*, as an arbitrary one, or proceeding on technical grounds. The main circumstance of the residuary gift, real and personal, naturally and in itself indicates, and strongly, an intention that both should follow the same course and be dealt with in the same way. But I also am of opinion that the gift of a real residue of itself would, be enough upon another ground, namely the meaning of residue, still more if as here the words "not otherwise disposed of," are found in the gift; for this shows that the devisee under such a gift is to take all the real estate not otherwise given; and this must exclude the heir who cannot take under any gift. Such, too, is Lord Hardwicke's opinion in *Gibson v. Montford*, although he does not decide the case upon this ground alone. As for *Wright v. Horne*, 8 Mod.; which is sometimes referred to in questions of this kind, and which as well as *Goodtitle v. Opie*, (ibid.), is relied on in the argument at the bar, in *Gibson v. Montford*, it clearly has no application, for it related entirely to a lapsed devise of land, which is now admitted not to pass under such residuary gift.

The residuary gift is that which the present case has in common with the three others which I have

cited. But the other circumstances of the case, I mean the other provisions of the will, are strong to indicate the same intention of excluding the heir-at-law.

I observe that reliance was placed below on the parenthetical words ("upon his giving such security, &c.") and his Honor is represented to have treated these as in the nature of a condition precedent. To be sure if it were so that would make a great difference in the argument; but I can on no account allow it. There is nothing like condition precedent here, or indeed subsequent either, but it is a direction or provision wholly nugatory and useless, inasmuch as the law would have required the performance of the same thing wholly unconnected with the devisee taking under the gifts, or his manner of taking; a direction to give a receipt might as well be called a condition precedent.

Judgment reversed.

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After hearing counsel, as well on Thursday the 10th day of July, as on Friday the 14th and Saturday the 15th of August, upon the petition and appeal of James Ackers, an infant, &c., complaining of an order of the Court of Chancery, of the 19th of December 1831, which order was signed by the Lord Chancellor, and enrolled on the 21st day of February 1832, and made in a certain cause wherein, &c., and praying that the same might be reversed, &c., — it is ordered and adjudged by the Lords, &c., that the order complained of in the said appeal be and the same is hereby reversed, and that the demurrer be allowed without prejudice to the equities of the several

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parties to this suit, in the suit and appeal of *Phipps v. Ackers*, now depending in this House; and it is further ordered, that the costs of all parties in the court below, and of the appeal, be paid by the Appellant, James Ackers, out of the estate, &c.

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## ENGLAND.

(K. B. AND EXCHEQUER CHAMBER.)

JAMES ANDREWS - - Plaintiff in Error;

THOMAS DREVER, THOMAS }  
MAWDESLEY, and WIL- } Defendants in Error.  
LIAM TURNER - - }

Upon the trial of an action brought by a lay-impropriator under the statute 5 & 6 Ed. 6. c.13., for not setting out tithe, evidence having been given that the tithe in question had never been paid for the lands of the Defendant, the judge was required to direct the jury that a grant or release of the tithe ought to be presumed. But the judge told the jury that they could not presume a grant from mere nonpayment, and that it was no answer to a claim of tithe by a lay-impropriator. Whereupon a bill of exceptions was tendered and signed. A verdict upon this direction having been given for the Plaintiff, and judgment thereon, upon a writ of error the judgment was affirmed in the Exchequer Chamber and in the House of Lords.

From evidence of a grant from the crown in 1579, and of modern enjoyment of tithes, the jury may presume intermediate conveyances of the rectory between the date of the original grant and a lease of tithes dated in 1686.

Perception of tithe of corn is evidence of a title to tithe of hay .

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THE Defendants in error being lay rectors of the parish of Prestbury, in the county palatine of Chester, and claiming to be entitled to the tithes of corn, grain, and hay, yearly arising and growing on the lands in the occupation of the Plaintiff in error, situate in the said parish, in Easter term, 1831, brought their action under the statute of the



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2 & 3 Edward 6. c. 13., against the Plaintiff in error, as the occupier of lands within the said parish, for not setting out his tithes.

The Defendant appeared and pleaded to the action and declaration, that he did not owe the sum of money demanded, &c.

The action being at issue, came on for trial before Bolland B. and a full special jury at the summer assizes for the county of Chester, in the year 1831, when, upon the evidence stated in the bill of exceptions hereinafter mentioned, a verdict was given for the Plaintiffs against the Defendant (the Plaintiff in error) for the sum of 105*l.* 15*s.* In the course of the trial, the counsel of the Plaintiff in error tendered the bill of exceptions to the ruling and judgment of the learned judge. The bill of exceptions, containing all the facts material to the judgment of the case, was as follows, viz. :—

Upon the trial of the said issue the counsel learned in the law for the said Plaintiffs, in support of the said action, produced and gave in evidence certain letters patent of Queen Elizabeth, dated the 19th day of December, in the year of our Lord 1579, whereby the said Queen Elizabeth gave and granted unto George Calveley, Knt., George Cotton, Hugh Cholmeley, Thomas Leighe, Henry Mainwaring, John Nuthall, and Richard Hurlestone, esquires, their heirs and assigns, for ever, divers hereditaments in Cheshire, anciently appertaining to the monastery of Saint Werberg, and among other things, all the manors, hereditaments, commodities, emoluments, and profits whatsoever, of the said Queen Elizabeth, situate, lying, and being in the ville, fields, parish, or hamlets of Prestbury, in the county of Chester, and all and singular

the tithes, portions, and oblations whatsoever, issuing, growing, renewing, or being out of and in the ville, fields, parish, or hamlets of Prestbury aforesaid, and also all the rectory and church of Prestbury aforesaid (which said manor, rectory, and premises to the said monastery of Saint Werberg did theretofore belong and pertain), and all and singular manors, glebes, tithes, obventions, pensions, portions, and all and singular other profits, possessions, and hereditaments whatsoever, situate, lying, renewing, or being in the ville, fields, parish, or hamlets of Prestbury aforesaid, or elsewhere soever, in the said county of Chester, to the said rectory or church in anywise belonging or pertaining, or which as part or parcel of the same rectory or church were theretofore had, known, or reputed.

And the said counsel for the said Plaintiffs further produced and gave in evidence on the trial of the said issue, a certain deed of partition, executed by all the above-named parties, except the said George Calveley and the said Thomas Leighe, and dated the 1st day of October, in the year of our Lord 1586, whereby, after reciting the said grant from the said Queen Elizabeth, of the above-mentioned hereditaments (among others) to the said George Calveley, Knt., George Cotton, Hugh Cholmeley, Henry Mainwaring, John Nuthall, and Richard Hurlestone, and the said Thomas Leighe, and their heirs, and the death of the said George Calveley, they the said George Cotton, Hugh Cholmeley, Henry Mainwaring, John Nuthall, and Richard Hurlestone, remised, released, and for them, their heirs and successors, for ever wholly quitted claim to the said Thomas Leighe and his heirs (in his full and peaceable possession being)

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all their right, title, claim, and demand whatsoever of and in the aforesaid rectory church and manor of Prestbury, and of and in all and singular the premises thereinbefore mentioned, with the appurtenances whatsoever, except and wholly reserved all and singular messuages, lands, tenements, and hereditaments whatsoever, with the appurtenances in Chelforde and Asthull, within the aforesaid parish of Prestbury, other than all and all manner of tithes, oblations, and obventions within Chelforde and Asthull aforesaid, yearly growing, coming, and renewing.

And the said counsel for the said Plaintiffs also produced and gave in evidence on the trial of the said issue, divers leases and counterparts of leases, of the tithes of corn, grain, and hay, and also of wool, lambs, pasture, and agistments of cattle, cows, calves, mares, colts, or foals, pigs, smoke pennies, Easter rolls, mortuaries, offerings, and all other tithes and tenths, dues and duties whatsoever, yearly coming, growing, renewing, arising, happening, or becoming due, tithed or titheable within the township of Woodford, in the said parish of Prestbury (within which township the lands of the said Defendant were situate), granted by different members of the family of Leighe of Adlington, for the time being, successors of the said Thomas Leighe above-mentioned, to the persons therein respectively named, many of the lessees under which leases were resident within the said township of Woodford, for certain terms of years, which were at the time of the trial expired, the earliest of which said leases bore date the 12th day of June, in the year of our Lord 1710, and the latest thereof bore date the 16th day of October, in the year of our Lord 1798.

The counsel for the Plaintiffs, in support of the action, proved the receipt of rent for and on account of Elizabeth Legh of Adlington, and Richard Legh of Adlington respectively, under and in respect of certain of the said leases, from the persons to whom the same were respectively granted as aforesaid: and the counsel for the Plaintiffs also produced and offered to give in evidence on the trial of the said issue, divers other leases, and counterparts of leases, of the tithes of corn, grain, and hay, and also of wool, lambs, pasture, an a gistment of cattle, cows, calves, mares, colts, or foals, pigs, smoke pennies, Easter rolls, mortuaries, offerings, and all other tithes and tenths, dues and duties whatsoever, yearly coming, growing, renewing, arising, happening, or becoming due, tithed and titheable within townships in the said parish of Prestbury, other than the said township of Woodford, granted by the different members of the family of Leighe of Adlington, for the time being, successors to the said Thomas Leighe above-mentioned, to the persons therein named respectively, for terms of years then expired, at different times, from the 11th day of November, in the year of our Lord 1686, which was the date of the earliest of the said leases, down to the 18th day of October, in the year of our Lord 1798, which was the date of the latest thereof: whereupon the counsel for the said Defendant interposed, and insisted that the said evidence so offered to be given by the said Plaintiffs was not good or admissible in law, upon the issue aforesaid, but the said justices held and affirmed, that the said evidence so offered to be given by the said Plaintiffs as aforesaid, was good and admissible in law. And thereupon the said

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counsel for the said Plaintiffs gave in evidence the said leases last aforesaid, and the same were then and there read before the said justices and the said jury, and the said counsel for the Plaintiffs proved the receipt of the rent reserved, under some of the same last-mentioned leases, for and on account of the lessors therein named respectively. Upon the trial of the said issue, one Thomas Brodbelt was produced and examined upon oath as a witness, by the said counsel for the said Plaintiffs, in support of the said action, who deposed that in the year 1811, he became valuer of the tithes of the parish of Prestbury, for Mr. Richard Legh of Adlington, that he continued to be so untill the year 1818: that Mr. Richard Legh died in the year 1822. That he (the witness), received tithe rents from the occupiers of the different farms. That he valued the tithes of Woodford, and among others, those of the Defendant's lands; that he valued corn, grain, barley, cattle, pasture, meadow, and other things; that he never received any tithe in kind: that one Martha Barber was an occupier of land in the township of Butley in the parish of Prestbury; that he once received 5s. from her for a tithe of hay, that this was after the dispute about the payment of hay tithe arose: that he did not know of any other receipt of hay tithe; that the occupiers of land in the parish of Prestbury had some all hay and some both hay and corn: and upon the cross-examination of the said Thomas Brodbelt, by the counsel for the said Defendant, the said Thomas Brodbelt deposed and gave in evidence, that he believed there were three hundred farms in the parish; that all these farms had hay grass; that some had no corn; that he valued

the hay in each farm every year; that he always took account of it, sometimes by the ton, sometimes by the acre; that it was in or about the year 1815 or 1816 that the occupiers of lands in Woodford first objected to pay for hay; that payment for hay was claimed, and that it was always included in the valuation; that since the dispute, the rents had been estimated with reference to the corn tithe only; that he could not say that he had ever received hay tithe; that old Mr. Glegg of Lower Withington paid him a rent which must have included hay tithe, because otherwise the rent would not have been so much; that such payment was under a verbal agreement for tithe of corn, hay, and all titheable things; that the valuation was generally made in June, July, and August, both before and after the hay was cut; that the charge for meadow was for hay; that when the hay had been cut, they went and looked at the stack; that he had at different times collected the tithes in kind; that on those occasions the corn tithe alone was received, because tithe of hay was objected to; that he never saw the tithe of hay set out; that Dr. Davis did set out the tithe of hay, after the disputes arose, under the direction of the witness; that Capesthorpe was a township within the parish of Prestbury; that Mr. Legh had nothing to do with the tithes of that township; that there were three other townships in the parish from which no tithes were payable to the Leghs; that the tithes of these townships belonged to the vicar; that such of the tithes as were not valued by the witness were under lease; that the rents produced only about 2000*l.* a year. That he afterwards made some agreements, and that he received

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nearly 4000*l.* in one year; that since that time he had received only the tithe of corn; that the amount of corn tithe was about 2000*l.*; that if the hay tithe were received, it would be about 2000*l.* more; that Mr. Richard Legh came into possession in the year 1806, and that it was for him that he valued. The said Thomas Brodbelt being examined by the said justices further deposed, that the difference between the 2000*l.* ordinarily received, and the 4000*l.* which he stated to have been received in one year, arose from the high price of grain in that year, and the circumstance of there being more land in tillage. Thomas Deane was also produced as a witness, and examined on oath by the counsel for the said Plaintiffs, in support of the said action, who deposed that he began to value the tithes of the parish of Prestbury in the year 1818, and continued to do so till the year 1827; that he valued both corn and hay tithe; that in the year 1825, he valued the property in Woodford; that the valuation of the hay tithe on the land of the Defendant for that year was 6*l.* 8*s.*; that he received for corn tithe only; that he began to receive in the year 1820; that he paid Mr. Grimsditch the rents for the years 1820, 1821, and 1822; that latterly he had paid it, by Mr. Grimsditch's order, into Daintry and Ryle's bank, to the account of Messrs. Turner and Mawdesley; that he received tithe of corn from the Defendant during all that time. Upon the cross-examination of the said Thomas Deane, by the counsel for the said Defendant, the said Thomas Deane deposed and gave in evidence, that he had known the parish forty years · that he had known corn tithe as long as he

could remember, hay tithe all over the parish; that he had been a farmer in the township of Butley in the said parish; that he had both corn and hay; that he had quitted his farm eighteen years ago; that he was a farmer there for twenty-nine years; that he paid his own tithe when he was farmer to the steward; that he did not know whether he paid hay tithe or not. And the said Thomas Deane being re-examined by the counsel for the said Plaintiffs, deposed and gave in evidence, that he paid a sum of money for the whole tithe of his farm; that he always understood that hay was charged something. One Thomas Brodbelt, the younger, was also produced as a witness, and was examined upon oath, by the counsel for the said Plaintiffs, in support of the said action, who gave in evidence and deposed, that he had received the tithe of corn from the Defendant in respect of the land in his occupation in Woodford, for the last six years, and that the Defendant paid it without dispute; that the lands of the Defendant had produced hay and clover; that the clover lands had been in tillage, that when they were so, the corn tithe was paid for them without dispute; that he paid the tithe to the Macclefield bank, to the account of Mr. Browne, the receiver of the Adlington estate. And on his cross-examination by the counsel for the said Defendant, the said Thomas Brodbelt, the younger, further deposed, that there were more than 600 farms in the parish of Prestbury, exclusive of those in the four townships, the tithes of which were paid to the vicar; that the vicar received the tithes of Titherington, Siddington, Upton, and Falleybroom, being four townships in the parish of Prestbury; that

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Mr. Davenport was the owner of Capesthorpe, and that he did not, to the knowledge of the witness, pay any tithes to the vicar. Thomas Grimsditch was also produced as a witness, and examined on oath, by the said counsel for the said Plaintiffs, in support of the said action, who gave in evidence and deposed, that he had been acquainted with the Adlington estate upwards of thirty years; that Mrs. Elizabeth Legh was the first person he remembered in possession; that she was succeeded by Richard Legh; that during the time of Elizabeth Legh's possession, the tithes were generally in lease; that this continued for a few years after Richard Legh came into possession; that Richard Legh died in 1822; that since that time he (the witness) had been connected with the management of the property. That from the year 1822 up to the appointment of a receiver he received the rents for the tithes on account of the Plaintiffs; that in the year 1825 he received rents from Deane; that after that time he opened an account with the Macclesfield bank in the names of Turner and Mawdesley, and directed the payments to be made to that account; that Dr. Drever was not then in the country; that Dr. Drever had, during the earlier part of the time, interfered in the management; that witness accounted to all three; and the counsel for the said Defendant then admitted, that the tithes received since the year 1822 had been received for and on account of the three Plaintiffs; and the said Thomas Grimsditch, being further examined, deposed, that he (the witness) had also been a resident in the parish of Prestbury, that he had occupied lands in the township of Macclesfield in that parish, that

he had paid tithe for the land, that it was almost entirely meadow land, that he had paid tithe of hay, that he commenced the occupation in 1816, that this was after the commencement of the suit for the hay tithe, that he was not aware that the tithe of hay was disputed in Macclesfield, except in one instance. And in his cross-examination by the counsel for the said Defendant, the said Thomas Grimsditch further deposed, that the Adlington family had no claim to the great tithes of the township of Capesthorpe; that the small tithes of that township and of Siddington were paid to them; that the first resistance to hay tithe was in 1814, that the claim preceded the objection, and was acquiesced in for a time. John Birchinall was produced as a witness and examined on oath by the counsel for the said Plaintiffs, in support of the said action, who gave in evidence and deposed that he was sixty-eight years old; that he had lived the greater part of his life in the township of Asthull, in the parish of Prestbury; that he remembers the late Thomas Darcey, who in his lifetime was the valuer of the tithes for the Adlington family; that he recollected the said Thomas Darcey's renting the tithes of the township of Sutton, in the parish of Prestbury, for twenty-eight years, that the witness used to receive the arrears for the said Thomas Darcey during the whole of that time; that the farmers paid for hay and corn; that the witness used to go with Mr. Darcey to show him the farms when he was valuing; that he went once in seven years; that Darcey first valued the corn, and then he asked the occupier how many cows he had, and on being told, he said, then you mow so many acres of ground, and then said I will

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let you know in a short time what you have to pay; that afterwards Darcey sent the witness to the farmers with a note to each, stating the amount of his tithe; that he never heard any farmer dispute the account, that there were many farmers who had no grain on their land, but had hay; that he never knew any instance of any farmer who had hay only on his farm disputing the payment; that he had held a farm at Sutton for the last forty years, and that his father had it before him; that during all the time witness held the farm, he paid for the tithe both of corn and hay; that he understood from his father, that he (the father) did so; that after Mr. Darcey's lease was out, the witness and four others took the tithe; that Darcey still continued to value; that the witness collected the rent according to his old valuation; that the farmers paid him regularly. Upon his cross-examination by the counsel for the said Defendant, the said John Birchinall further deposed, that the valuation and the charges were both made in writing, and they applied to Sutton only; whereupon the evidence for the said Plaintiffs in support of the said action being concluded, the counsel for the said Defendant then and there insisted before the said Justices that there was no evidence of any right or title in the said Plaintiffs to the tithe of hay, and that on the contrary, a title adverse to the Plaintiffs had been proved and established by the documents given in evidence by the said Plaintiffs in support of the said action; but the said Justices held and affirmed that there was evidence of title in the said Plaintiffs to the tithe of hay: and the counsel for the said Defendant, further insisted that the said leases and counterparts which had

been given in evidence by the counsel for the said Plaintiffs, were irrelevant to the said issue, and ought to be withdrawn from the consideration of the said jury, inasmuch as the Plaintiffs were not shown to derive any title from, or to be in any way connected with the persons by whom the said leases were respectively granted. But the said justices then and there held and affirmed that the said leases and counterparts were not irrelevant to the said issue, and refused to withdraw them from the consideration of the said jury.

Samuel Wainwright, Joseph Ward, John Jennings, Joshua Cragg, Joseph Taylor, and Joseph Brindley were severally produced as witnesses, and were severally examined on oath by the counsel for the said Defendant on behalf of the said Defendant, who severally gave in evidence, and deposed that they had been formerly occupiers of land within the said parish, but not within the said township of Woodford; and that they never knew or heard of any claim or payment of the tithe of hay in respect of such lands; and that no tithe of hay was in fact claimed or paid in respect of the said lands respectively, so long as they continued in the occupation thereof; that the payments for tithe were always made in money, but that the sums paid were not more than the amount of the tithe of corn in each year; and thereupon the said justices then and there summed up the evidence on both sides to the said jury, and delivered their opinion to, and directed the said jury that mere nonpayment of tithe was no answer to a claim of tithe by a lay impropiator; that it was clear that it was no answer to the claim of a spiritual rector; that mere nonpayment was no answer to the claim

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even of a lay rector, and that the jury could not presume a grant from mere nonpayment of tithes; and the said justices then and there further delivered their opinion to, and directed the said jury, that from the evidence of the grant from the crown in 1579, and the evidence of modern enjoyment of tithes, the jury might presume in favour of the said Plaintiffs intermediate conveyances of the rectory between that time and the year 1686, the date of the first lease produced; and the said justices then and there further delivered their opinion to, and directed the said jury that the perception of the tithe of corn by the said Plaintiffs was evidence of a title in the said Plaintiffs to the tithe of hay; that the tithe of hay followed that of corn, unless it was shown to have been severed by some grant or conveyance. And the said justices then and there further delivered their opinion to, and directed the said jury that the said leases and counterparts of leases as well of tithes growing and arising within the said township of Woodford, as of tithes growing and arising in other townships within the said parish of Prestbury, and the evidence of payment of the rent reserved under such leases, were good and admissible evidence on behalf of the said Plaintiffs for the purpose of rebutting the presumption of a grant which, it was contended on the part of the said Defendant, arose from nonpayment of the tithe of hay; and the said jury then and there gave their verdict for the said Plaintiffs upon the issue aforesaid; whereupon the counsel for the said Defendant excepted to the aforesaid opinions and directions of the said justices, and inasmuch as the several matters aforesaid and the opinions

and directions of the said justices do not appear by the record and verdict aforesaid, the counsel for the said Defendant prayed that the said justices would set their hands and seals to this bill of exceptions containing the matters aforesaid, and the opinions and directions of the said justices according to the form of the statute in that case made and provided, &c.

The Defendants in error proceeded to judgment upon the verdict in the court of King's Bench, and thereupon the Plaintiff in error sued out a writ of error in the court of Exchequer chamber; by which court, after argument, the judgment was affirmed, and a writ of error was then brought in Parliament.

For the Plaintiff in error Sir *F. Pollock* and Mr. *J. Jervis*.

The question is, whether as against a party claiming, not in right of the church, but by a lay title, a grant of tithes may be presumed from non-perception, the omission to assert a right on the part of the claimant, and the consequent enjoyment of the whole produce of the land, including the tithe, on the part of the *terre-tenant*. The authorities may be adverse, but all reason and argument is in favour of the exemption. In every other case, except that of tithes, possession, and enjoyment, without question, establishes a right. Courts of justice make all possible presumptions to support the possession of land or any profit arising out of it, or even any easement in the land of another; and even in the case of tithes in the

\* A great number of actions upon the same question were pending. In some of these the Defendants moved for a new trial, and the motion was refused.

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hands of lay-impropriators opinions have been expressed by many eminent judges in favour of the general application of the ordinary doctrine of presumption. The question here, which arises upon the bill of exceptions is, whether the jury should have been directed or left to presume a grant by which the enjoyment of the Plaintiff in error, and the non-claim of the Defendant in error, or those by whom he is represented, would be explained. There is neither ground nor principle for an exception in the case of tithes in the hands of a lay-impropriator. He may by deed discharge the land, or any portion of it, from tithes. If he cannot discharge the land—if it be objected that there is no such discharge of tithes—he may do what is equivalent, surrender, or release, or grant them to the *terre-tenant*; and, although they are not absolutely extinguished, the grant may be executed to one person and the land conveyed to another, so as to prevent the lay-impropriator or any claiming under him from asserting a right to the tithes of that land; and this is a reason, and ought to be in law a sufficient ground, for a jury to presume the existence of a grant, release, or conveyance, and the loss of the instrument by which it was made, which is the rule of law applied to secure and quiet possession in all other cases. There are many authorities against this position, but they seem to proceed on the ground that there can be no prescription in *non decimando*, and that the rule is applicable to the case of tithes claimed by a lay-impropriator, as well as to those in the hands of the church. But the distinction is obvious, and has been noticed and acknowledged by Lawyers and Judges of great learning and reputation.

The cases upon the question are, *Strutt v. Baker* (1), *Medley v. Talmy* (2), *Corporation of Bury v. Evans* (3), *Fanshaw v. More* (4), *Fanshaw v. Rotherham* (5), *Scott v. Airy* (6), *Fryar v. Sims* (7), *Nagle v. Edwards* (8), *Lord Petre v. Blencoe* (9), *Rose v. Calland* (10), *Berney v. Harvey* (11), *Meade v. Norbury* (12), *Williams v. Bacon* (13), *Oxenden v. Skinner* (14).

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In these cases, although the decisions in many of them are adverse, it is seen that the Judges feel themselves bound by precedent and not authorised to decide on principle; in some of the cases they suggest that, if these precedents are to be overruled it must be by the authority of this house; and if this question were untouched by decision, it might well be asked why length of enjoyment in all other cases should, in the eye of law, quiet possession, and establish rights, but in this should have no effect whatever? Why an actual grant or some evidence tending to show a grant, or some dealing with the property in the tithes should be required? Why presumption should not on the same ground be adopted in this case, as in others not dissimilar in fact or in principle? If as argued in the Court below the fact of non-payment admits of two explanations, viz. either that the tithes have not been claimed or that there has been a grant, and the one is a legal discharge of the burden on the land and the other is not, according to the settled maxim of law that alternative is to be adopted which

- (1) 2 Ea. & Y. 421. (2) 1 Ea. & Y. 620. (3) Bunb. 345.  
 (4) 2 Ea. & Y. 92. (5) Ib. 158. (6) Id. 342.  
 (7) 3 Ea. & Y. 1368. (8) 2 Ea. & Y. 427. (9) Id. 467.  
 (10) 2 Ea. & Y. 485. (11) 17 Ves. 119.  
 (12) 2 Price, 338.; 3 Bligh, O. S. 211.  
 (13) 3 Ea. & Y. 1105. 1178.; 3 Russ. 525. (14) 3 Ea. & Y. 1384.



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makes the retention legal ; where a person has an authority \* the law does not permit any question whether an act is done under the authority or by wrong, as in a case of distress where malice might be found, the Courts do not permit the question to go to the jury. This doctrine and practice is founded upon the common principle of presumption in favour of that which is legal. With respect to the distinction which has been suggested between mere non-payment and the dealing with the tithes by the land-owner, is there, in point of principle, any ground for the distinction? If the Plaintiff in this case, never having been called upon to pay tithes, had sold the estate, and in the particulars described it as tithe-free, could it be contended that his title to them would have been strengthened? *Oxenden v. Skinner* was a case in which there had been no dealing with the tithes and the doctrine of presumption prevailed.

*Lord Lyndhurst.*—There had been a severance of the tithes. It is said that the tithes had been severed from the rectory, ever since the Conquest. If those tithes had been rectorial tithes, no time would have barred the Rector.

For the Plaintiff in error.


If the nonpayment of tithes and the actual enjoyment of them by the owner and occupier of the land immemorially, will not afford a presumption of title to them, there is no principle upon which it can be argued, that the mention of the tithes in the deeds of the owner, which is frequently a mere form, should make such a difference as to raise the presumption. The effect of

\* See *Lucas v. Nockells*, 7 Bligh, N. S. 140.

mere nonpayment should be left to the consideration of the jury, subject to the observations of the judge, upon the absence of documents of title. Such documents are presumed in favour of the claim of a lay-rector to tithe. Why should a similar presumption be excluded to rebut that claim, or to establish the right of the landowner? The question at least ought to have been left to the jury.

For the Defendant in error *The Attorney-General* and Mr. *Temple*.

The question is this, whether mere non-payment of tithes is an answer to a claim of tithes by a lay-impropriator, that is to say, retention and nothing but retention. On the part of the Defendant no title deed was given in evidence: it was not shown that at any period, the Defendant or those under whom he claimed had dealt with the tithes as being the owners of them. It was argued that a lay-rector might release the tithes and thereby the land would become tithe free. That is a misapprehension. This is not the case of an easement which may be released and from which the lands may be discharged: tithes are a distinct tenement, a separate descendible hereditament, which is the subject of conveyance as any other separate hereditament. If it were indeed a mere easement of which the land might be discharged—if it were something which would merge in the land—if it could not be kept up as a separate possession,—if after long enjoyment there would be nothing at all to show in the family (as in the case of a easement) that they had enjoyed the tithes together with the land, there might be some hardship in the doctrine which is com-

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plained of. But where a lay-rector grants all the tithes that are to issue from a particular portion of the land, or a particular portion of the tithes issuing from any one piece of land, the tithes still remain as a separate holding; and if the grantee, being the terre-tenant, conveys the land, it would not go tithe-free. If he were to devise the land to his youngest son, the eldest son, as heir-at-law, would inherit the tithes. With regard to tithes, the title *prima facie* is not in the owner or occupier of the land but in another. The lay-rector though he has the power of conveying, can only do it by deed. If the conveyance from the lay-rector has been recent it may be forthcoming: if it has been ancient there will have been family settlements, wills, and conveyances, which may show that the tithes have been enjoyed by the family to whom the land belongs. If there be anything beyond mere retention,—if it appears that by a purchase deed, by a conveyance, by a settlement—if there be any colour of title—that, coupled with the retention of the tithes, might be sufficient to raise the presumption.

As to the cases, there is not a single decision among those which have been quoted, that impugns the direction of the learned judge. There is not a case in which it was ever held that the claim of the lay-rector was barred upon mere retention of the tithes. Your Lordships sitting upon a writ of error, are to inquire what the law is: you are sitting *jus dicere*, *non jus dare*, and if you see that the decisions are uniform, you will respect those decisions just as much as any inferior Court. But in the doctrine itself, there is no

hardship or unfairness. On the contrary, if it were overruled, it would allow the occupier to prescribe, *in non decimando*; that is the necessary and inevitable result, and the jury would be left capriciously to resort to the fiction of a grant in many cases where no such grant had ever existed. As to any *dicta* which have been thrown out, they strengthen the decisions because they show that the Judges from whom those *dicta* proceeded, reluctantly yielded to the current of authority finding that it was too strong to be resisted.

In *Medley v. Talmy*, the defence did not rest on mere nonpayment: there was a grant whereby all tithes belonging to the land were conveyed, and then it was conveyed as tithe-free. In this case they rely on non-payment alone. In *Berney v. Hervey* and *Fanshaw v. Moore*, the claim of the lay-rector was upheld. It is said that he succeeded upon the ground that there was to be no prescription *in non decimando*; but as the doctrine of enjoyment and presumption necessarily leads to a prescription *in non decimando*, which is in effect what is contended for on the other side, those decisions are expressly in our favour. As to *Fanshaw v. Rotherham*, title was proved on the part of the defendant by evidence that the tithes in question had been made the subject of conveyance by those under whom he claimed, for 130 years, and that they had been in the pernancy of such tithes during the same period. We admit, that where title or colourable title is proved, the Judges in such an action as this, may be justified in leaving the question of presumption to the jury; but even in the case of *Fanshaw v. Rotherham*, Lord


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Keeper Henley said, " he was clearly of opinion, as the law then stood, no man could prescribe *in non decimando* against a lay impropiator." In *Scott v. Airy*, it is said that "for 170 years they (the tithes) have been the subject of sales, mortgages, and devises, as other property, and have always been considered in the same light as the other real property of the persons who from time to time have claimed them. They were capable of being enjoyed by the persons who have enjoyed them; and the question now is, whether a court of equity ought to interfere to take the possession from persons who have been in possession so many years, with the knowledge of the rectors? It does not appear how the Riddleys became entitled, but it appears that being in possession, they settled, mortgaged, and devised the tithes, as their own absolute property." Such is the language of the report in that case. It was perfectly consistent with the doctrine laid down and acted upon in preceding decisions. The case proceeded upon the proof of title for a long period of years. As to *Nagle v. Edwards* and *Petre v. Blencoe*; in neither of those cases was there any proof of title whatsoever, and in both the decision was in favour of the lay-rector. In *Rose v. Calland* Lord Loughborough not having refreshed his memory by resort to the current of authorities said only that, "He would not compel a purchaser to take a title in the face of such decisions." In *Berney v. Hervey*, Lord Eldon took the distinction on which we rely: — "If we had nothing to show but the mere retainer of the tithes not an actual grant or pernanacy, or that we had in our title deeds treated

the property as belonging to us, the mere retainer would not raise the presumption against any one, not against a spiritual rector, nor upon *Fanshaw v. Rotheram*, against a lay-rector."

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As to *Meade v. Norbury* Mr. Baron Wood stood alone, the other three judges of the Court of Exchequer were against him, and he fell into the mistaken supposition that the land might be discharged of the tithes, whereas, they are holdings and hereditaments, as distinct from the land out of which they issue, as if they were two separate parcels of land. *Williams v. Bacon* is not in point. There the question arose upon a bill by an ecclesiastical rector. It was a dispute, not between the ecclesiastical rector and the terre-tenant, but between the ecclesiastical rector and another person who claimed to be entitled to the tithes. That other person proved a very strong title which the Vice-Chancellor supported, but a new trial was granted.

In each and every one of these cases, there was something beyond the mere nonpayment. Title was proved; there was a dealing with the tithes as being the property of the persons to whom the land belonged, and there was enjoyment. Nonpayment with proof of title, entitles the judge to leave the question to the jury, whether there has not been a grant from the lay-rector, which has severed that portion of the tithes from the rectory. The authorities being all one way, it is bold to say that they are contrary to principle and justice. The rule of law has subsisted for 150 years. If it leads to inconvenient consequences, that is a question for your Lordships in your legislative capacity; and a

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bill has been brought in and passed by the legislature which allows a presumption to be raised from mere nonpayment; but the very passing of that bill appears to me to afford a strong argument as to the state of the law before that bill was introduced. To overturn that long series of uniform authorities, at a time when the public convenience requires no such interference, and when a remedy has been afforded to the public by the legislature, would be useless and dangerous as a precedent.

*Ross v. Aglionby* \* and *Fairfax v. Holdsworth*, † were also cited in the argument.

At the conclusion of the argument the following question was put to the Judges :—“ Whether the mere nonpayment of tithes is a sufficient answer to a claim of tithes made by a lay-impropriator.” The unanimous opinion of the Judges was delivered as follows :—

*Tindal*, C. J. C. P.—I have to state to your Lordships the unanimous opinion of my learned brethren and myself, that the mere nonpayment of tithes is not a sufficient answer to a claim of tithes made by a lay impropriator. That there can be no prescription *in non decimando* against a lay impropriator, is a principle of law so thoroughly settled, that it can admit of no doubt. The only legal ground, therefore, on which the nonpernancy of tithes can be set up as an answer to a claim of tithes is, that it affords a presumption of the grant of tithes made by the lay impropriator to the tenant. So far as the authorities have been brought

\* 4 Russ. 494.

† 1 Young, 79., and on appeal, 8 Bligh, N. S. 882.

before your Lordships, not a single instance can be found in which there has been the presumption of a grant from the lay rector, where there has not been some positive evidence, something more than the mere non-perception of tithes from all time as the foundation for such a presumption. The course of authorities is uniform in this respect, so as to render it unnecessary for us to enter into that discussion.

The question put by your Lordships is comprised in terms merely negative—that there has been no perception of tithes by the lay-rector at any period. No positive or affirmative ground is suggested; no separation of any species of tithe from the rest; no description in any of the deeds which form the muniments of the title to the land, by which the land itself is stated to be tithe-free; no instance suggested in which the tithes have ever been treated as property by the owner of the land, either in family settlements or in conveyances from one hand to another or in leases from the owners of the tithes; in all which cases there would have been a positive dealing with the tithes as a substantive property, separate and distinct from the land, and in which the enjoyment of that property through the non-perception by the lay-rector would have gone along with, and been consistent with the documentary evidence.

In those supposed cases nothing would have been wanting but the production of the original grant of the tithes from the lay-rector to the terre-tenant, and the want of such original grant might well be supplied by the presumption that it once existed and was lost by time or accident, on the

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ordinary grounds on which such presumptions are made; but the presumption in this case if made at all must be grounded on the mere non-perception and nothing else. We are unable, however, to see how the presumption, resting on such negative grounds alone, can be established either in principle or effect, otherwise than as a prescription *in non decimando*. In both cases the evidence, and the only evidence, must be the right of the rector on the general law of the land, the occupation of titheable land by the terre-tenant and the non-perception of tithes arising from the land, from the earliest times to the rector. The claim on the part of the landowner is precisely the same, whether set up as a prescription *in non decimando*, or the presumption of a grant; it is in both cases a claim that the land is to be held free from the payment of tithes. If therefore, such a state of facts can be held to support the presumption contended for, it would necessarily follow that in every case the nonpayment of tithes would have the full effect of a prescription *in non decimando*, though such a prescription is admitted not to be evidence in law. Upon these short grounds we have come to the conclusion which I have stated to your Lordships.

*Lord Lyndhurst.*—I entirely agree in the opinion which has been so well and distinctly expressed by the Lord Chief Justice. The course of authorities is too uniform, and the number of decisions on this point too great to justify us in departing from them on any grounds that have been stated at the bar. On the contrary, it would lead to this conclusion, that whereas a prescription *in non decimando* cannot be insisted upon, it enables the party under another shape and another

form, namely, by insisting on a non-existing grant lost by time or accident, to avail himself of precisely the same result as by the principle *in non decimando*. I am of opinion that the decision of the Court below was correct, and on these grounds, I move your Lordships that the judgment of the Court below be affirmed.

*Lord Brougham.* — I entirely concur in the opinion expressed by my noble and learned friend, and with the learned judges in their doctrine on this subject. It is not representing this case truly in point of fact, to state that it is one in which the decisions in the courts of Westminster Hall have been at variance or in conflict; in which at one time, and down to a certain period, namely, 1796 or 1797, they were one way, and that since that period they have been uniformly the other. If it were so, and all the courts in Westminster Hall without any controlling power exercised by this house in review and in reversal of the later decisions had for the last forty years uniformly treated the subject in this way, I should say even in that case, it would be a strong thing for your Lordships, to reverse a doctrine standing upon a current of former decisions, which had been adopted by the judges as evidence of the law, which had been accepted by the profession, and acted upon by them in advising their clients, which had been the foundation of many titles at present held under that supposed law. It would be a strong act for this house upon that forty years' law, (if it were so,) to alter the law which had existed previously, and for which that later course of decisions had been as it were the substitute. But that is by no means the case in point of fact; no

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such new law has been laid down since 1797 ; there is no conflict whatever of the earlier decisions with the later, when those come to be examined ; they may appear to be in favour of the argument contended for by the Appellant, or against the right of the impropiator ; but when they are examined minutely, in no one case has it been found,—(and I put it to the counsel for the Plaintiff in error, and he could furnish me with none,)—that even the presumption of a grant has been set up to defeat the right to tithes by the lay impropiator, any more than of a spiritual person, where there was a mere non-pernancy unaccompanied by any other matter. *Medley v. Talmy* in the reign of king William is the strongest of those cases, and in that case there had been a conveyance of forty or fifty years old, namely, executed in 1651, of the lands in question as tithe-free ; and whoever holds that case of *Medley v. Talmy* to be in conflict with the decision in this case, takes his account of the case from the marginal note and not from the statement of the context.

Agreeing, as I entirely do with the learned judges in their opinion, and in the grounds on which they have stated their opinions, and also with my noble and learned friend, who has moved the affirmance of the decision of the Court below, it is quite unnecessary for me to go at length, or indeed at all, into a comparison of those cases. Suffice it to say, that upon looking for the only case not cited at the bar, and which Lord Eldon in *Berney v. Hervey* alludes to, as having been decided in the Court of Exchequer against the law contended for, (namely, the case in 1727,) we find there is no distinct account to be gathered from what

his Lordship did say about it. Two cases have been suggested as answering the description, but when examined, neither of them does so. One is *Sweetapple v. Kingston*, (2 Eagle & Young, p. 1.) But upon looking at it, I find it is impossible that can be the case, because that is principally a question of modus; and in the other points it goes still further from it. The other case which a learned judge suggested, is *Stone v. Rideout*, (2 Eagle & Young, p. 6.) which is reported in Bunbury, p. 262.; but when I look to that case, I find that it is wholly inapplicable; it does not at all answer the description, though it is in the year 1728, and comes near the date of Lord Eldon's citation: it was a case in which, in answer to a bill for tithes, there was set up a right in the vicar to the tithes, consequently, that must by law be proved by endowment, and they failed to prove it. What did they say next? They said that the land was covered by a certain modus; therefore, that no more agrees with the description than *Sweetapple v. Kingston*. We are therefore led to conjecture that there is no such case, for it has escaped the industry of the bench, and also of the learned counsel at the bar.

It is said, that judges have doubted this law, that Lord Eldon, still more Lord Redesdale, Mr. Baron Wood, (though certainly overruled by the majority of the Court in the case cited,) Lord Hardwicke, Lord Talbot and Lord Loughborough also in a case before him, have expressed a similar opinion, and the whole weight of those doubts (for they amount to no more,) has been pressed upon your Lordships and upon the learned judges who have assisted you in the argument. I think it operates the other way.

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What am I to say of the law when I find such judges as Lord Hardwicke and Lord Talbot represented, (I do'nt know where, for I cannot find it in their own words,) but represented by Lord Eldon as having "struggled much but ineffectually against it\*?" Is that not saying in terms, that the law is too strong for them? And all the result of that doubt and struggle is, that they were defeated by the strength of the law, and that the decisions have been so uniform, and the law was so clearly established, that they could not alter it. I have looked into Lord Redesdale's argument,† and a most strong and cogent argument it is, as Mr. Baron Wood's also is, in the particulars to which Lord Eldon refers. Lord Redesdale's argument amounts to this, that one cannot see why this should ever have been the law; that it rests on no sound principle; that the reasoning which applies to a spiritual rector does not apply to a lay rector. That is perfectly true, but there are many other cases in which a uniform course of decision has made the law and settled it; and although it originated in reasons which you cannot now discover, or where you see it originated in error, even then you can never unsettle the law so established. A very recent case proves this strongly,—I mean the celebrated case of *Cadell v. Palmer*, from which it is clear that the doctrine that an executory devise is good not with reference to infancy, but simply good for twenty-one years beyond a life or lives in being, originated in the consideration that until twenty-one an infant not being of age,

\* In *Berney v. Harvey*, 17 Ves. 119.

† In *Norbury v. Meade*.

could not bar the remainders over by suffering a recovery or levying a fine. Ever since the judicial decision in the Duke of Norfolk's case, professional men have acted, and parties have purchased not with reference to the infancy, and the difficulty of levying a fine or suffering a recovery, but with reference to this, that absolutely a man could entail his lands on lives in being, and twenty-one years over. And what have your Lordships held in *Cadell v. Palmer*? \* And what did the learned judges all advise your Lordships to hold? Why, that a man could entail his lands for a life or lives in being, and that the executory devise was good, which added to that a term of twenty-one years in gross, without reference to infancy at all. And I put the question to their Lordships with the view of setting it in the strongest light, by excluding the infancy altogether. That is a remarkable instance where every body sees that the rule crept into the law *per incuriam*, and by a sort of mistake, by a confusion (if I may so speak,) easily explained, which, if we were to make the law now, we should not perhaps fall into, but which cannot be taken into account in order to impugn the authority of a train of uniform decisions.

I cannot conclude the observations which I have thought it necessary to add on this important case, without remarking upon the course of argument pursued by the very learned and ingenious counsel for the Plaintiff in error, in his reply. He says we are not bound by decisions below, but we are only bound by our own decisions. If that were the case, we should have nothing to do but to hear appeals and writs of error, and every

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\* 7 Bligh, N. S. 22.

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possible question would be set afloat. We are not bound by law; that is, we may if we choose do a wrong act, we may neglect the whole course of decisions in Westminster Hall. There is no doubt of that, because they have not the force of decisions in the supreme Court of Parliament, the last resort; but that we ought always to listen to decisions from inferior courts, is evidenced by the circumstance that we hear this case argued in the presence of the learned judges, in order that they may advise the House upon the question of law. If we are not to be influenced by the authorities of the courts in Westminster Hall, why do we ask them to tell us what our journals could tell us? They cannot look into our journals; they look into their decisions and tell us their opinions on the authority of decided cases, and we hold that to be a great help and guide to us. A strong ground might be laid for holding a decision not to be law. *Fitzroy v. Gwillim* (1), was for some years reckoned bad law, yet was never actually overruled: and the same remark may be made on that case of *Corbett v. Poelnitz* (2). What is that but saying, that every now and then a wrong decision is made and then is set right, a proposition very different from saying there is a current of decisions all one way, a uniform course of decisions without any one exception? We cannot say there is any conflict here.

Lord Redesdale's argument in *Norbury v. Meade*, is most able; he seems to say there may be a prescription *in non decimando* in the case of a lay impropiator. It looks like that I admit; but whether he meant it to be so is another question:

\* 1 T. R. 153.

† 1 T. R. 5.

although he enters into a discussion to show the great difference between a lay rector and a spiritual rector.

I entirely concur in the opinion of the learned judges, and recommend your lordships with my noble and learned friend to affirm the decision of the court below.

**Judgment affirmed.**

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## IRELAND.

(COURT OF CHANCERY.)

The Reverend MARCUS MONCK - *Appellant*;

|                                                                                                                                                                                                                                                                                       |                       |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|
| CHARLES HENRY PAGET, Esq., the<br>Honourable Sir CHARLES PAGET,<br>and Dame ELIZ. ARAMINTA, his<br>wife, HEN. G. MONCK BROWNE,<br>an infant, by the Rev. JOHN<br>G. BROWNE, his paternal uncle,<br>and next friend, DOM. BROWNE,<br>and CATHERINE ANN ISABELLA,<br>his wife - - - - - | } <i>Respondents.</i> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|

H. M., who died in December, 1815, by his will devised a term in his lands at W. in trust to pay his debts, and the legacies and annuities given by his will. He thereby gave to his mother R. M. the sum of 500*l.* and an annuity of 200*l.*, in addition to her jointure of 800*l.* a year charged upon the lands devised. He also gave to his sister A. M. an annuity of 400*l.*, upon condition that she released his estates from any charge, claim, or demand she might have thereon.

Upon a bill filed in 1816, to carry the trusts of the will into execution, R. M., by her answer, claimed her jointure of 800*l.* a year, and a sum of 300*l.*, with interest, as charged upon the lands devised under covenant by her marriage settlement. She also claimed the annuity of 200*l.*, and the sum of 500*l.*, with interest, given by the will; and all arrears of rents of the lands devised due at the death of her husband, the testator's father, which had been received by the testator. She further claimed a proportion of the value of the timber planted on the lands devised by her husband when tenant for life, under the acts for the encouraging of planting in Ireland; and, finally, she claimed under the will of her husband the residue of his personal estate.

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A. M., by her answer, set up various claims, as charges upon the lands devised, arising out of the settlement made upon the marriage of her father and mother R. M., and upon transactions with her father and brother, the testator; among which claims was an annuity of 400*l.* under an agreement alleged to have been made by the testator with the father, in consideration of his forbearing to exercise in favour of A. M. a power of appointment over 15,000*l.* charged upon the lands; and she submitted that the condition annexed by the will of H. M. to the annuity of 400*l.* thereby given to her was inequitable, and that she ought not to be put to any election until her rights against the estate of H. M. were ascertained.

R. M. died in 1818, having by will given the residue of all her property to A. M., who was appointed executrix, and proved the will under the decree made in the cause in 1818. A. M. carried in a charge, by which she claimed as representative of R. M. an apportionment of the annuity of 800*l.* under settlement, and of 200*l.*, and the legacy of 500*l.* under the will of H. M.; and in her own right she claimed the arrears of the annuity of 400*l.* under the will of H. M.; and she thereby offered to release the estate of H. M. from every other charge, claim, or demand whatsoever, which she might have thereon.

The Master by his report found that A. M. was entitled, as executrix of R. M., and in her own right, according to the charge; and a decree was made for sale of the lands comprised in the term, to satisfy the charges. This decree was made in 1831. A. M. died in 1830, having received all arrears of the annuities claimed under the will in her own right, and as due to R. M., and also interest upon the legacy of 500*l.* given to R. M. under the will of H. M.

Upon a second suit against the trustees of the inheritance, representing that it would be more for the benefit of the parties interested that the fee-simple should be sold instead of the term, it was accordingly directed by a decree, which was enrolled in 1832, and proceedings were taken for the sale. In 1834 a motion was made in both causes before the Master of the Rolls by M. M., the administrator *de bonis non* of R. M., for leave to go before the Master in the first cause, and prove the several unproved demands made by and in the answer of R. M., but omitted in the charge of A. M., or to file a supplemental or other bill to establish such demand. This motion having been refused, a new motion was made

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before the Lord Chancellor for leave to file a supplemental or other bill to establish the unproved claims, or that such other order might be made as to the Court should seem fit.

This motion being also refused,

Upon appeal to Parliament, a case was made for permission to carry in a charge and prove the claims in the original suit.

The appeal was dismissed with costs.

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**P**REVIOUS to the marriage of George Paul Monck with the Lady Araminta, his wife, the father and mother of the Appellant, a marriage settlement was executed, bearing date the 22d day of April, 1755, whereby the estates of George Paul Monck were settled on him, and the issue male of the marriage in strict settlement, charged with a jointure of 800*l.* a year for Lady Araminta, payable half yearly; and George Paul Monck covenanted, that in case Lady Araminta should survive him, his heirs, executors, or administrators, should, out of his real or personal estate, pay her 300*l.* immediately after his decease.

In Michaelmas term, 1777, the said George Paul Monck and Henry Monck, the eldest son of the marriage, suffered a recovery of the settled estates, and by deed declaring the uses of the recovery, and bearing date the 3d day of December, 1777, the said estates were limited to the use of trustees for a term of 1000 years, and subject thereto to the use of George Paul Monck for life, with remainder to the use of Henry Monck in fee. The trusts of the term were by sale or mortgage of the estates, to raise such sum of money, not exceeding 15,000*l.*, and to pay and apply the same in such manner and for such purposes as George Paul Monck by

any writing under his hand and seal, or by his last will and testament, should direct and appoint.

George Paul Monck died on the 7th of October, 1804, leaving Lady Araminta, his widow, and Henry Monck, his eldest son. Some years before his death, by his will, dated on the 24th of May, 1790, George Paul Monck bequeathed all his ready money, rents, and arrears of rent, due and owing to him at his decease, household goods and furniture, with the lease of the house then occupied by him in the city of Bath, and all other his personal estate and effects whatsoever, to the said Lady Araminta, her executors, and administrators, subject to the payment of his funeral and testamentary expenses and simple contract debts only, declaring it to be his intention, that the property given to Lady Araminta, by his will, should as far as in his power be exempted and exonerated from the payment of his bond debts, judgments, mortgages, and other incumbrances, which he thereby directed should be charged on, and affect his real estates only; and he appointed Lady Araminta sole executrix of his will; he afterwards added to his will a codicil, bearing date, on the 25th of May, 1802, whereby, after reciting the will, he restricted the bequest of his household goods and furniture, with the lease of his house at Bath, to the natural life of Lady Araminta, bequeathing it over after her decease to his daughter, Anne Monck, her executors and administrators, but confirmed his will in all other respects.

Upon the death of George Paul Monck, Lady Araminta Monck declining to act as his executrix, Henry Monck took out letters of administration, with the will annexed of George Paul Monck, and

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possessed himself of his personal estate and effects, and received the rents and arrears of rent of the real estates, which were owing to George Paul Monck, at his death, but never accounted for them to Lady Araminta Monck.

Henry Monck died in the month of December, 1815, having made his will, dated on the 24th of July, 1815, whereby he devised all his towns, castles, lands, and other hereditaments, to the use of Arthur Hume, Esq., and the Honourable William Vesey Fitzgerald, their executors and administrators, for a term of 4000 years; and subject thereto he devised one moiety of the said hereditaments to the Right Honourable George Beresford, commonly called Lord George Beresford, and Arthur Saunders Gore, Earl of Arran, their executors and administrators, during the life of his daughter, the Respondent, Catherine Ann Isabella Browne, wife of the Respondent, Dominick Browne, upon trust to pay the rents and profits of the said moiety to her separate use, during her life, and after her decease to the use of the said Dominick Browne for life, with remainder to the use of the sons and daughters of Catherine Ann Isabella Browne, in strict settlement, with divers remainders over; and he devised the other moiety of the hereditaments (subject to the term of 4000 years) to the use of George Beresford, and Arthur Saunders Gore, Earl of Arran, their executors and administrators, during the life of his daughter, the Respondent, Elizabeth Araminta Paget, wife of the Respondent, Sir Charles Paget, upon similar trusts for her separate use during her life, with remainder after her decease to the use of Sir Charles Paget for life, with remainder to the use of the

sons and daughters of the said Elizabeth Araminta Paget, in strict settlement, with divers remainders over; the trusts of the term were by sale, or mortgage, or other disposition of the estates, to levy and raise such sum or sums as should be sufficient to pay and satisfy all his just debts, funeral and testamentary expenses, and the legacies and annuities given by his will, and to apply the sums so to be raised in payment thereof accordingly. He then, among other bequests, directed the payment of 200*l.* a year to his mother, Lady Araminta Monck, and her assigns, during her life, in addition to her jointure, and 400*l.* a year to his sister, Ann Monck, in case she should survive Lady Araminta Monck; and he declared that he had given the annual sum of 400*l.* to Ann Monck upon this express condition, that she released his estates from any charge, claim, or demand whatsoever that she might have thereon. He also gave 500*l.* to his mother, Lady Araminta Monck, to be paid at the expiration of twelve calendar months after his decease; and he gave and bequeathed all his personal estate and effects to his wife, Lady Elizabeth Monck, for her absolute use and benefit, and directed that if any of his debts should be paid out of his personal estate, Lady Elizabeth Monck should, in that case, be entitled to be reimbursed out of the premises comprised in the term of 4000 years, whatever monies should have been applied out of his said estate and effects, in payment of his debts; and he appointed his wife sole executrix of his will.

Henry Monck was indebted at the time of his death to various persons to a large amount, and after his death Lady Elizabeth Monck, having

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survived him, proved his will, and in March, 1816, filed her original bill in the court of Chancery in Ireland, against Lady Araminta Monck, Ann Monck, Dominick Browne, and Catherine Ann Isabella his wife, and Henrietta Araminta Monck Browne, their only child, Charles Paget, and Elizabeth Araminta his wife, and the Respondent Charles Henry Paget their eldest son, Arthur Hume and William Vesey Fitzgerald, the trustees of the term of 4000 years; George Beresford and Arthur Saunders Gore Earl of Arran, the Appellant Arthur Dawson, and Catherine his wife, James Hamilton, Margaret Carroll, Joseph Finnegan, the Right Honourable Henry de le Poer, Marquis of Waterford, and Walter Jones, all named in or interested under the will of the said Henry Monck; and after setting forth the will of Henry Monck, and his death, and stating that Henry Monck was indebted at the time of his death to a number of persons, and that several of them had applied to the Plaintiff to pay their demands, and had threatened to harass her with divers suits for that purpose, the bill prayed (among other things) that the Defendants might set forth an account of the real estates devised to be sold, and that they might set forth, what right, title, interest, property, claim, or demand they, or any and which of them respectively, had to the real estates, and that Ann Monck might make her election whether she would accept the annuity to her in the will given, releasing all her other claims and charges whatsoever which she might have in or to the said estates, or rely and insist upon the said claims and charges, and that she might set forth the same respectively, and that an account might also be taken

of the debts, legacies, and funeral and testamentary expenses of Henry Monck, and also of any charges affecting the said lands for arrears of jointure, rent-charges, or otherwise, and that the several creditors and legatees of Henry Monck, might be at liberty to come in before the Master, and make proof of their several demands, and that the trusts of the said will might be in all things carried into execution, and that a competent part of the lands and premises comprised in the term of 4000 years might be sold for the said term, for the purposes in the will mentioned, and that the several creditors who should come in and contribute to the expenses of the suit, might be paid their demands with interest and costs, and that the other creditors and legatees might be paid their demands.

Lady Araminta Monck filed her answer to the foregoing bill, and admitted the will of Henry Monck, particularly the bequest to her of the annuity of 200*l.*, and the sum of 500*l.* and with reference to the estates devised to be sold, she said that she believed they were the same estates comprised in the settlement of the 22d of April, 1755, whereby the jointure of 800*l.* and the sum of 300*l.* were secured to her, but which sum of 300*l.* had never been paid to her. The answer then set forth the will of George Paul Monck, his death, and administration to him by Henry Monck. The Defendant then said she claimed to be entitled to receive from the said real estates the two annuities of 800*l.* and 200*l.*, and the two sums of 300*l.* and 500*l.*, with interest on the said two sums from the periods when the same respectively became payable, together with all rents and arrears that were due and owing to George Paul Monck, at the time of

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his decease; and the Defendant also claimed "such proportion of the value of the timber planted by George Paul Monck on his said estates as George Paul Monck was entitled to, under and by virtue of the several acts for the encouragement of planting in Ireland;" she also claimed all the residue of his personal property, after payment of his simple contract debts, funeral expenses, and the costs of proving his will.

Ann Monck also filed her answer to the bill, and thereby admitted the will of Henry Monck, and more especially the bequest to her of the annual sum of 400*l.*, in case she should survive her mother, Lady Araminta Monck; and she claimed the annuity of 400*l.*, and also brought forward several other claims against the estates.

In November 1817, the Plaintiff amended her bill, but did not require Lady Araminta Monck to answer her amended bill; and afterwards, by an order, dated on the 20th of November, 1817, the names of the Appellant and others were struck out of the bill as parties defendants.

By a decree in the cause, dated on the 13th of November, 1818, it was, among other things, ordered, that the Master should take an account of the debts, charges, and incumbrances affecting the real estates of Henry Monck; and it was ordered and declared, that Ann Monck was bound to make her election between the reversionary annuity bequeathed to her by the will of Henry Monck, and her other claims in the pleadings mentioned affecting the estate of Henry Monck, before she was permitted to file any charge in the Master's office under the decree. And it was

further ordered, that all creditors and legatees of Henry Monck, and all persons having debts, charges, and incumbrances affecting his estates, should have liberty to come in before the Master to prove and ascertain the same.

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Lady Araminta Monck died in the year 1818, before any further proceedings were had in the cause. She had previously made a will, whereby she appointed her daughter, Ann Monck, her sole executrix, who accordingly proved her will; but no bill of revivor, or other bill, was ever filed in the cause for the purpose of bringing the personal representative of Lady Araminta Monck before the court.

Ann Monck, on the 1st of July, 1819, filed her charge under the decree, and thereby charged that she was entitled as the executrix of Lady Araminta Monck (though not before the court in that character) to the arrears of the annuity of 800*l.*, secured by the settlement of the 22d of April, 1755, and to the arrears of the annuity of 200*l.*, bequeathed to Lady Araminta by Henry Monck, and also to the legacy of 500*l.*, bequeathed to Lady Araminta by Henry Monck, with the interest due thereon. She also elected to take the annuity of 400*l.* bequeathed to her by the will of Henry Monck, and offered to release his estate from any other charge, claim, or demand, that she might have thereon. But Ann Monck did not, either by her charge, or otherwise in her life-time, bring forward, as executrix of Lady Araminta Monck, the several other claims set forth by Lady Araminta Monck in her answer.

Pursuant to the decree, the Master made his report, dated on the 23d of January, 1821, and

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thereby found that Ann Monck was entitled, as such executrix of Lady Araminta, to an arrear of 500*l.* on foot of the annuity of 200*l.* bequeathed to her by Henry Monck, and also to the legacy of 500*l.* bequeathed to her by Henry Monck.

No exception was taken to this report by Ann Monck in her life-time, and the cause coming on for further directions on the 7th of March, 1821, it was, amongst other things, ordered and decreed, that the Defendants, Dominick Browne and Catherine Ann Isabella his wife, Sir Charles Paget and Elizabeth Araminta his wife, or some or one of them, should forthwith pay unto the Plaintiff and the several Defendants and creditors their respective demands, with interest so far as they were entitled thereto until paid; and also the costs of the Defendants, or, in default thereof, that the Master should, within six months, sell the several towns and lands comprised in the said term of 4000 years, for the purpose of paying the incumbrances directed to be raised under the said trust term.

No sale took place under this decree, and, in November, 1831, the Respondents filed their bill in the Court of Chancery in Ireland, against Lady Elizabeth Monck, George Beresford, and Arthur Saunders Gore, Earl of Arran, for a sale of the inheritance of the said estates. The bill set forth the will of Henry Monck, his death, and the probate of his will by Lady Elizabeth Monck, and the said original bill filed by her, for carrying the trusts of the will into execution: the Respondents' bill then set forth the order of the 13th of November, 1818, and the Master's report made in pursuance thereof, and the final decree of the 7th

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of March, 1821 ; the Respondents' bill then stated, that Henry George Monck Browne was born after the date of the final decree, and that under the limitations of the will he was entitled to an estate tail in a moiety of the estates, upon the decease of the survivor of Catherine Ann Isabella and Dominick Browne, and that no sale had been had of the estates comprised in the term of 4000 years, and that it would be greatly for the benefit of all parties interested in the estates that a sale of the fee and inheritance of a competent part thereof should take place under the decree of the court with the trust term, instead of the trust term only, and that the money arising from such sale should be applied in payment and discharge of the debts, charges and incumbrances affecting the said estates. The Respondents' bill then prayed that the fee and inheritance of the premises in the trust term of 4000 years contained might be decreed to be sold, and that the proceeds might be applied to discharge all debts and incumbrances affecting the lands.

The Defendants to the Respondents' bill having put in their answers, the cause came on to be heard upon bill and answer on the 12th of May, 1832, when it was ordered and decreed that the Earl of Arran and Lord George Beresford should be at liberty to sell the fee and inheritance of the several lands and premises in the pleadings mentioned, or a competent part thereof, for payment of the several debts, charges, and incumbrances, interest and costs, decreed to be paid out of the produce of the sale of the term of 4000 years, and that the proceeds of such sale should be applied in discharge of the several debts, charges, incumbrances, interest and costs.

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Ann Monck died on the 11th of September, 1830, and upon her death the Appellant instituted proceedings for obtaining letters of administration *de bonis non* to the estate of Lady Araminta Monck, and also to the estate of Ann Monck; these letters were not granted until the month of February, 1832. The Appellant also obtained letters of administration *de bonis non*, with the will annexed of his father George Paul Monck.

No sale of the estates took place under the decrees, and, on the 20th of January 1834, the Appellant, as administrator of Lady Araminta Monck, moved before the Master of the Rolls in Ireland, that he might be at liberty, at his own expense, to go before the Master in the first cause, and file a charge in his office, and proceed thereunder for the purpose of proving the several unproved demands made by Lady Araminta Monck in her answer, that is to say, first, her claim of 300*l.* with interest, under the settlement of the 22d of April, 1755; secondly, her claim on foot of rents, and arrears of rents of the lands and premises in the settlement and pleadings mentioned, which were due and owing to George Paul Monck at the time of his decease, and by him bequeathed to Lady Araminta, subject only to his simple contract debts, and to his funeral and testamentary expenses, and which, to the amount of 7084*l.* 1*s.* 11*d.* were received by his son Henry Monck as his personal representative; and thirdly, her claim of George Paul Monck's proportion, or value of the timber trees planted by him on the estates, as tenant for life thereof, pursuant to the statutes, which said several claims were by inadvertence omitted to be proved by Ann

Monck, the former personal representative of Lady Araminta, in the cause of Monck and Browne, or otherwise, that the Appellant, as such personal representative of Lady Araminta Monck, might be at liberty to file a supplemental bill, or such other bill as he might be advised, for the purpose of establishing such demands.

The Master of the Rolls made no rule on this motion.

On the 31st of January, 1834, the Appellant, pursuant to notice entitled in both causes, moved the Lord Chancellor of Ireland for liberty to file a supplemental bill in the first-mentioned cause, or such other bill as he might be advised for the purpose of establishing the several unproved and unadjudicated claims made by Lady Araminta Monck in her answer in the first cause, and as specified in the affidavit of the Appellant filed in the first-mentioned cause on the 11th day of January then instant, or for such other order as the Court might please to make.

The affidavit of the Appellant read in support of the motion, stated the bill in the first-mentioned cause, the answer of Lady Araminta, and the decree of the 13th of November, 1818; and that Lady Araminta died before any further proceeding was taken thereon, having appointed Ann Monck her executrix. The affidavit then stated that Ann Monck filed her charge in the cause as hereinbefore mentioned, but omitted the several other claims made by Lady Araminta in her answer, (that is to say,) the claim of 300*l.* with interest from the death of George Paul Monck, the claim on foot of the rents and arrears of rents of the settled and devised estates, due and owing at the time of George Paul

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Monck's decease, and amounting to 7084*l.* 1*s.* 11*d.*; and also the claim of the value of the timber trees planted by George Paul Monck on the settled and devised estates as tenant for life thereof, and which amounted to the sum of 5000*l.* or thereabouts; the affidavit then stated the Master's report of the 22d of January, 1821, the decree of the 7th of March, 1821, and the proceedings in the secondly mentioned cause; the affidavit then stated the death of Ann Monck in 1830, and that she had ever since the death of Lady Araminta her mother, resided in England, and was unacquainted with the facts relating to the unproved claims of Lady Araminta, and that she was during her life-time incompetent to have instructed her solicitor as to the facts and proofs incidental to those claims; the affidavit then stated, that letters of administration, with the will annexed, of Lady Araminta were granted to the Appellant in the month of February, 1832, and that thereupon the Appellant caused application to be made to the solicitor employed by Ann Monck as executrix for the papers which had belonged to her in such right; and that considerable delay took place therein before the Appellant's solicitor received the same, and that thereupon very tedious searches and inquiries became necessary, and were entered into on the part of the Appellant in order to ascertain the grounds on which those unproved claims were founded: and that the Appellant's solicitor used the utmost diligence to investigate the same; the Appellant, by his affidavit, expressed his belief that the intended sale of the estates would realise a fund amply sufficient for payment of all the creditors, legatees, and incumbrancers of Henry Monck, including the unproved claims of the De-

fendant Lady Araminta ; and that a considerable surplus was likely to remain after payment thereof.

The affidavit of Henry Murphy the Appellant's solicitor, also read in support of the motion, stated, that in November, 1830, Henry Murphy received instructions from the Appellant to procure letters of administration to Lady Araminta Monck and Ann Monck, and that he was not able to obtain the same until the month of February, 1832 ; that upon obtaining such administrations, Henry Murphy was instructed to apply for and after much delay, succeeded in obtaining from the solicitor of Lady Araminta Monck and Ann Monck, the papers and documents in the first mentioned cause belonging to them, and, that upon inspecting such papers, it appeared that certain claims made by Lady Araminta in her answer and specified in the affidavit of the Appellant had never been put forward by her executrix. The affidavit then stated, that the reason why such claims were not put forward, was, that Ann Monck and her solicitor, had not in their or either of their power, any evidence to prove the same ; and that it appeared by a case submitted to counsel by her solicitor, for the purpose of preparing proofs in the first mentioned cause, that Lady Araminta Monck and Ann Monck, were not prepared with evidence as to the planting of timber, nor, as to the arrear of rents, from want of certain accounts referred to in the case, nor as to the claim under the marriage settlement from want of the original deeds of the 22d of April 1755, and the 3d of December 1777. The affidavit then stated, that due diligence was used at the time to obtain the deeds, and that a notice in writing had been served on the Plaintiff in the first cause, requiring

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the production of the deeds, and that no answer had been returned thereto, and that a fruitless application and search had been made for the original accounts on which the claim to the arrear of rent was founded. The affidavit then stated, that in the months of July and October last, Henry Murphy and the Appellant, had made two visits to the lands in the pleadings mentioned and that on such occasion, Henry Murphy had discovered sufficient evidence to sustain Lady Araminta's claim for the planting and value of the timber mentioned in her answer, and Henry Murphy had also discovered the name of the Gentleman who had been conducting clerk and assistant to the land and law agent of Henry Monck, and by his means, Henry Murphy had obtained access to the papers which had belonged to the testator's agent, amongst which the original accounts were found, and were then in the Deponent's possession. The affidavit further stated, that the original deeds mentioned in the case, had, since the date of the final decree in the first cause, been brought into and lodged in the office of the Master in the cause. The affidavit also stated, that the Deponent had found the notice filed by Ann Monck in the first cause, and dated the 1st of July, 1819; whereby she elected to take the annuity of 400*l.* in preference to the other claims in her answer mentioned.

The case submitted to counsel by the solicitor of Lady Araminta Monck and Ann Monck and referred to in the affidavit of Henry Murphy, the three original accounts therein also referred to, and the notice of the 1st of July, 1819, were read in support of the motion.

The Respondents, the Plaintiffs in the second

cause, opposed the motion of the Appellant, and grounded their opposition on the reasons appearing in the affidavit of Leonard Dolbin, their solicitor. This affidavit stated that the final decree in the first cause was enrolled on the 30th of November, 1832, and the final decree in the second cause was enrolled in November, 1832. The affidavit stated that Ann Monck filed her answer in the first cause, and thereby relied on her claims under the marriage settlement of George Paul Monck; that Henry Monck bequeathed the annual sum of 200*l.* to Lady Araminta during her life, and also a legacy of 500*l.*, and to Ann Monck an annuity of 400*l.* during her life upon condition of her releasing his estates from any charge, claim, or demand that she might have thereon. The affidavit then stated, that on the 1st of July, 1819, Ann Monck filed her said charge, under the decree in her own right, and as executrix of Lady Araminta, claiming as above mentioned. The affidavit then stated, that the charge was duly proved, and the amount thereof, and of the annuity of 400*l.* had been paid from time to time out of the funds in the cause, partly to Ann Monck, and partly to the Appellant, since her decease: that Lady Araminta Monck, by her last will and testament, gave and bequeathed to Ann Monck, 3000*l.*, to the Appellant, 1000*l.*, and to a person named Finnegan, 100*l.*, and the residue of her estate and effects to Ann Monck, and appointed her executrix. The affidavit also stated, that the Deponent was altogether unacquainted with the demands stated in the Appellant's affidavit that Mr. Henry Monck, Lady Araminta Monck, Miss Ann Monck, and Blaney Owen Mitchell, the persons who must have been acquaint-

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ed with the facts relating to the said demands, were all dead, and that Lady Araminta, was the sole executrix named in the will of George Paul Monck.

By an order made on the same day, the motion was refused with costs.

The Appeal was against this order.

For the Appellant, Mr. *Wigram* and Mr. *Shadwell*.

The unproved claims of Lady Araminta Monck, that is to say, the claim of 300*l.*, with interest from the death of George Paul Monck, the claim of all rents and arrears of rent that were due and owing to George Paul Monck at the time of his decease, and the claim of such proportion of the value of the timber planted by George Paul Monck on his estates as George Paul Monck was entitled to, were all subsisting charges on the estates of Henry Monck at the time of his decease, and are not under the circumstances barred by length of time.

The charge filed by Ann Monck in the Master's office, whereby she elected to take her annuity of 400*l.* in preference to her other claims upon the estates of Henry Monck, can only be construed to operate as a release of what she claimed in her own right, and not of what she claimed as a representative of Lady Araminta Monck. Ann Monck was not in her lifetime in possession of the evidence necessary to support the unproved claims of Lady Araminta, although she used all due diligence to procure such evidence, and therefore cannot be considered to have waived the claims in her lifetime, and the Appellant has only recently obtained possession of the evidence necessary to support the unproved claims.

The estates of Henry Monck are still unsold, and are amply sufficient to satisfy the unproved claims of Lady Araminta Monck, as well as the other claims thereon, and the Appellant does not seek to disturb in any manner the existing proceedings in the causes : under such circumstances he ought to be permitted to carry in a charge, and to prove the claims according to the practice of the Court.\*

For the Respondents, Mr. *Pemberton* and Mr. *Loftus Loundes*.

It is manifest that when Ann Monck carried in her claims on her own account and as representative of her mother, under the decree in the first mentioned cause, she and her solicitor were aware of the various demands which had been set up by her mother in her lifetime. Counsel had been consulted as to the possibility of maintaining them. It could not therefore have been from inadvertence that they were abandoned. It is of no importance whether they were abandoned on the ground that they were unfounded, or that the party interested did not think fit to be at the trouble or expense of seeking for evidence to support them, or that she chose voluntarily to release her brother's estate from them : it is sufficient that having the sole legal and the sole beneficial interest in the subject, she did in fact abandon such claims, in the same manner as she abandoned all claims in her own right beyond those arising under the will of Henry Monck.

The claims which the Appellant now seeks to be at liberty to substantiate, are made in respect of sums of money alleged to have been charged

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upon land or rent, a present right to receive which accrued to a person capable of giving a discharge or release upwards of twenty years before the motion of the Appellant, which is the subject of the appeal, was made, or the notice thereof given, and no part of the principal money nor any interest thereon has been paid, nor any acknowledgment of the right thereto been given in writing, signed by the person or persons by whom the same if due would have been payable to any person entitled thereto, within the period of twenty years before the motion made or notice given.

On the motion of the Appellant, no order could have been made, which would have given to him any right, which he has not without such order, nor could any order to be made thereon have affected the rights of the Respondents or any other parties interested in the subject-matter of the two suits.

The order which the Appellant sought by his motion would, if it operated at all, have the effect of altering a decree pronounced thirteen years ago, and enrolled upwards of eleven years ago, and not capable of being reversed or altered, and no sufficient reason is given for the delay which has taken place in making the present claims.

Part of the claims of the Appellant must depend upon the result of accounts, which cannot be taken in either of the existing suits nor in any supplemental suit which he might institute.

*Lord Brougham.* — In this case I have no doubt upon the form, (I do not mean to say that I have any doubt upon the merits but,) I have no doubt whatever upon the form: the course of this proceeding is perfectly manifest. There was

first a motion before his Honor the Master of the Rolls in the alternative. It is not for leave to file a supplemental bill, but first for leave to go before the master, and there take the benefit of the decree which had been pronounced, and in the alternative to file a supplemental bill, “ or (says the notice of “ motion, which I considered as meaning nothing) “ for such other relief as the Court may direct.” The Master of the Rolls refused both alternatives, or if they must be called three, the three alternatives. The first point relied upon, and to which the attention of the party must have been chiefly directed by its standing first, and which is most specific, namely, the motion for leave to go in, he refuses to grant ; they do not obtain leave to file a supplemental bill, and he gives them no relief whatever.

The next thing which the party does is to go to the Court of Chancery, not by making an appeal motion to discharge the order of his Honor, for that would have been opening both the first and the second point,—it would have been a complaint that his Lordship had not given them leave either to file a supplemental bill or to go in and prove,—but instead of that the party is advised to make another application to the Lord Chancellor. It is only for leave, as I read the notice, to file a supplemental bill, or for such other relief as the Court may direct. That, therefore, is confined to an application for leave to file the bill, because I hold it to be perfectly clear that in the case of prayer for relief appended to a specific motion or intended to be made part of the case, the notice of motion which is intended to apprise the party of what is asked must give something more specific

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than the general alternative, "such other relief as the court thinks fit;" and that under that name or prayer, nothing can be given by the Court except what is incidental to the particularity which precedes, and is something short of the whole of that particularity, or at all events something *ejusdem generis*; I hold it therefore to be clear that under the notice in this case before the Lord Chancellor it was not competent to his lordship to have given leave to go in and prove, that not having been asked for, but only leave to file a supplemental bill, unless, which sometimes happens, the other party consents, which in effect would be consenting to the amendment of the notice on terms at the bar, and would have been in fact consenting to the order without notice at all. It would have amounted to a waiving of the objection that might be taken for want of notice. That is not, however, pretended to have been done in this case.

That is my opinion upon this notice, which is for leave to file a supplemental bill, taking it as though nothing had passed previously to the notice, and as though no reference had been made to what passed previously. But the case appears still stronger from the reference which is made in the notice to what passed at the Rolls coupled with the confining the notice given before the Lord Chancellor to one of the alternatives, it was exceedingly calculated to mislead and to make it be believed, that upon further consideration they had advisedly refrained from asking both of the two alternatives which had been refused at the Rolls, and therefore had confined their application before the Lord Chancellor to one alternative. I hold it to be upon those grounds perfectly clear that the Court of Chancery

in Ireland was acting quite rightly in not allowing the party to file a supplemental bill.

From the order refusing this relief this appeal has arisen. Now we have an appeal against — what? Not an appeal against the order refusing leave to go in and prove, but to file a supplemental bill; that is the shape of the case as it would first come before us, and observing that that was not likely to be successful, and finding that it might be held, that the Court of Chancery had been right in refusing leave to file a supplemental bill, as contrary to the course of proceeding; and that the decision of your Lordships might be in affirmance of this refusal of leave to file the supplemental bill, they apply now—for what? That they may have the benefit of the suit, and file a bill of review, or a suit after the decree has been made, which is a common case when a bill is dismissed, because if you do not get leave to file another you are met by the plea of that decree, and therefore they wish to avoid the difficulty by having a bill of review. They feel that they have no chance with respect to the supplemental bill; that the Court below was right in having refused to give that unnecessary leave—so unnecessary, that if this order was to be affirmed, or if it had never been appealed from, they might just as well file such a bill, and have made an application for any benefit under the suit incidental to the supplemental bill, which they might have filed as if the Court had given them leave. In this instance that being the case they seem to have amended their case, and to have been minded to retrace the steps which they had taken in a wrong direction in Ireland, and instead of making the application here, namely, for leave

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to file a supplemental bill, they were minded to make an application, such as that which they had made before the Master of the Rolls, but not before the Chancellor, namely, for leave to go in and prove their claims. That appears to have been the course which they adopted here, but that is not the course in which we can carry them through; because the question now before us is, Has or has not the Court of Chancery in Ireland well decided in refusing leave to file a supplemental bill? and we are of opinion that the Court of Chancery rightly refused that leave in the case before us.

The case has been very ably argued by Mr. Wigram and Mr. Shadwell, with respect to remedying the suit which has been taken on the other side of the water. I do not wish to be understood in what I have said, as by any means encouraging them to file a supplemental bill; for aught I know it is the worst thing they can do. Seventeen years have elapsed, and for want of a personal representative; but who is the representative? The Reverend Henry Monck. He took out letters of administration in 1832: I asked if he was of age in 1815; but he is an old man, I understand. The marriage was in 1755, and the eldest son was of age in 1777. From 1777 to 1815 is very nearly 40 years; it is very likely that at that time the eldest son, being of age in 1777, (the parent in question could not go on child-bearing for 40 years), that the representative might be of mature age. Then why was there no representative? It will hardly do for the party to explain the lapse of time by saying there was no personal representative, for he might have been personal representative

during any one of those periods, and he did not choose to make himself so.

However I have no hesitation in recommending your Lordships to affirm the decision of the Court below, and to affirm it with costs to be taxed; I suppose the costs of the motion were given below.

*Lord Lyndhurst.* — I agree with the noble and learned Lord in point of form, and I recollect that Mr. Wigram, in his opening, was extremely desirous of getting rid of the effect of the decision of the Lord Chancellor, being in fact a confirmation of the decision of the Master of the Rolls, because he thought that might have some effect upon your Lordships' decision, and he therefore took occasion to state that the motions stood in different circumstances, whereas the whole scope of his present argument is to shew that they are the same.

With respect to the merits of the case, these are items in a general account. In the year 1802, the original testator died, and Henry Monck did not die till 1815. There were thirteen years therefore in which Lady Araminta might have filed a bill for a general account: she never thought proper to do so; and therefore it is not improbable that the result of that general account would not have been advantageous to her.

I think, therefore, upon the whole, that the decision of your Lordships should be to affirm the decision of the Court below, and to affirm it with costs.

Order affirmed with costs.

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## IRELAND.

(COURT OF CHANCERY.)

The Right Hon. JAMES Earl of  
BANDON - - - - - } *Appellant;*

RICHARD HENRY HEDGES BECHER,  
Esq. - - - - - } *Respondent.*

By indenture of marriage settlement in 1740, lands in Ireland were conveyed in trust for John Becher for life, remainder to his first and other sons, subject to a term of 99 years, in trust to raise by sale or mortgage £5000 for younger children, in such shares as John Becher should appoint. In 1763, John Becher, upon the marriage of his daughter Jane with O'Donovan, appointed £2000, which was settled after the death of O'Donovan upon the younger children of the marriage as he should appoint.

In January, 1768, Richard, eldest son of John Becher, borrowed of Richard Wright £2300; a mortgage was made of the lands in settlement, and a recovery suffered to enure after payment of the mortgage money to such uses as John and Richard Becher should appoint, and in default, &c., to the uses of the settlement of 1740. By deed executed in September, 1768, the uses were declared to John Becher for life; remainder to Richard Becher for life; remainder to the first and other sons of Richard, in strict settlement, with a power of revocation.

In 1769, on the marriage of Richard Becher, a term of 500 years was created to raise £5000, portions of younger children. John Becher was the eldest son of this marriage, and there were two younger children, who became entitled to the £5000.

John Becher the elder died in 1778, having by his will, under the powers of the settlement of 1740, appointed £2000 to his daughter Elizabeth, and £1000 to his son Michael, who

died, having bequeathed his share to his brother Richard, who on his second marriage settled that sum on the younger children of the marriage.

O'Donovan died in 1778, having appointed the £2000 settled on his marriage among his younger children.

In 1777, Elizabeth Becher married William Evans, and in 1779 they filed a bill in the Court of Exchequer in Ireland, against Richard Becher, and John, his son, then a minor, &c., praying payment of the sum of £2000, or that the lands comprised in the term might be sold, which was decreed. In 1781, Richard Wright filed a bill in the Court of Exchequer, against Richard and John Becher and others, praying payment of the mortgage money, &c., or a foreclosure and sale, which was decreed. In 1785, the younger children of O'Donovan filed a bill in the Exchequer against John and Richard Becher and others, praying payment of the £2000, or a sale, which was decreed. Under the decrees in these causes, sales were effected, in which the lands were purchased in trust for, and conveyances made to, James Bernard. He settled the lands by deed in 1784, and died in 1790, having by his will secured the residue of his estate to his son. John Becher died in the lifetime of his father, Richard, who also died in 1825. In 1728, R. H. H., the son of John Becher, filed a bill in the Court of Chancery in Ireland, charging collusion and irregularity in the proceedings, and praying a declaration that the decrees and sales in the Court of Exchequer were fraudulently obtained; that the plaintiff might redeem on payment of the sums paid by James Bernard, or that he might be compensated out of his assets, which latter relief was ordered by the decree and issues directed as to the value of the lands. This decree was affirmed on appeal.

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IN 1740 a deed was executed on the marriage of John Becher, the Respondent's great grandfather, by which lands in the county of Cork, then subject to charges by way of mortgage, were settled and limited to John Becher for life, and, subject to a jointure and a term of ninety-nine years, to the first and other sons of John Becher

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successively in tail male. The trusts of the term were to raise upon the death of John Becher 5000*l.* for younger children, in such shares as John Becher should appoint. The issue of the marriage were Richard Becher, and Michael, Jane, and Elizabeth Becher.

In 1763 Richard Becher, upon the marriage of his daughter Jane with Daniel O'Donovan, and in her favour, charged the lands comprised in the term with 2000*l.* and interest, at 5 per cent., which was settled upon the younger children of the marriage as O'Donovan should appoint. In 1763 the lands comprised in the settlement of 1740 were mortgaged for 2300*l.* to R. Wright, by John and Richard Becher, who covenanted to suffer a recovery of the lands, to enure after payment of the mortgage to such uses as John and Richard Becher should appoint; and they, by deed executed in 1768, declared the uses to John for life, remainder to Richard for life, remainder to the first and other sons of Richard Becher successively in tail male, with power of revocation.

Upon the marriage of Richard Becher in 1769, by a deed operating as a revocation, the lands were settled according to the uses declared in the preceding deed, and a term was created for raising 5000*l.* for the portions of younger children. The issue of this marriage were John Becher, the father of the Respondent, and Henry and Frances Becher, who became entitled to the 5000*l.*

John Becher, the great grandfather, died in 1778, having by his will, and under the power in the settlement of 1740, appointed 2000*l.* to his daughter Elizabeth, and 1000*l.* to his son Michael.

Michael Becher died in 1778, having by his

will bequeathed 1000*l.*, his appointed share of the 5000*l.*, to his brother Richard Becher, who, upon a second marriage, settled the 1000*l.* upon the children of that marriage, and that sum remained a charge upon the lands.

In 1777 Elizabeth Becher married William Evans.

Upon the death of John Becher the elder, William Evans and his wife filed a bill in the Court of Exchequer against Richard and John Becher, the grandfather and father of the Respondent, and against the parties interested under, and the surviving trustees of the terms created by the settlements of 1740, and 1768, and 1769, praying payment of their appointed portion of 2000*l.* with interest, or that the lands for the remainder of the trust-term of ninety-nine years might be sold for that purpose. Upon this bill, after answers put in, issue joined, a decree for account, and report of the sum due to the Plaintiffs, it was ordered, upon further directions, that Richard Becher should, in six months, pay the sum reported due with interest at 6 per cent., or in default that the lands comprised in the term should be sold, that the demand of the Plaintiffs should be paid out of the proceeds, and the remainder, if any, paid to Richard Becher.

In 1781 a bill was filed in the Court of Exchequer by Wright, the mortgagee, against Richard Becher, tenant for life, and John Becher, the Respondent's father, issue in tail in remainder, then a minor, and against Henry Becher, also a minor, in whom a charge upon the lands by way of mortgage for 1000*l.* paramount the settlement of 1740 had vested, and other parties, praying payment of the money due upon the mortgage, or in default a foreclosure and sale; but all the parties except

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Richard and John Becher were afterwards struck out of the bill; a decree was taken for account, and upon report of what was due to the Plaintiffs, it was ordered that Richard and John Becher should pay the amount, with interest and costs, in six months, or in default that the lands comprised in the settlement of 1740 and the mortgage deed should be sold to satisfy the mortgage, and the residue paid to the Defendants.

Daniel O'Donovan died in 1778, having by his will appointed 2000*l.* to his younger children, John, Jane, and Helen O'Donovan, minors, who by their next friend filed a bill in the Exchequer in 1785, against Richard Becher, and John, the Respondent's father, who was a minor, and others interested under the settlement of 1740, praying payment of the appointed portion of 2000*l.* with interest, to which they had become entitled under the settlement made on the marriage of their father with Jane Becher, or in default that the same might be raised by sale of the lands for the residue of the term of ninety-nine years; and upon decree for account and report of what was due, it was ordered that the lands should be sold and the amount paid, and the remainder of the produce paid to Richard Becher or those who should make a title to the purchaser.

John Becher, the Respondent's father, died in 1820, being then remainder-man in tail. Richard Becher, the tenant for life, died in 1825. Thomas Alleyn became the personal representative of Richard Becher and John Becher the elder.

Under the decrees in the three causes sales were made of the lands, which were purchased for James Bernard, the Appellant's grandfather,

and he by deed in 1784, settled part of the lands upon his son Francis, and the issue of the marriage. But these sales were afterwards by order of the Court made with the consent of James Bernard set aside; and new sales effected by arrangement among the parties. James Bernard, who became Earl of Bandon, upon his death left Francis, the remainder-man in tail, his real and personal representative. John Becher, the remainder-man in tail, died in 1820, and Richard, the tenant for life, under the settlement of 1769, in 1825.

In 1828, the Respondent filed a bill in the Court of Chancery in Ireland against Francis Earl of Bandon, Mary Countess of Orkney as the heiress-at-law of the surviving trustee of the settlement of 1784, and against Thomas Alleyne as the personal representative of John Becher the elder, and of Richard Becher, and others.

The bill, after stating (among other things) the facts hereinbefore set forth, alleged various reasons why the sales ought to be set aside; and in particular the bill alleged that a judgment which was therein alleged to have been confessed in the year 1714 for securing the sum of 300*l.*, and a debt of 1000*l.*, secured by a mortgage in fee of certain of the hereditaments comprised in the indenture of settlement of the 27th of March 1740, affected the said hereditaments prior to the said charges secured by the trust term of ninety-nine years; and that such judgment and mortgage debt, and the said sum of 1000*l.* appointed to Michael Becher, were then still subsisting.

The bill then proceeded to state the case as follows:—

That, by the decree in the cause of *Wright v.*

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Richard and John Becher were afterwards struck out of the bill; a decree was taken for account, and upon report of what was due to the Plaintiffs, it was ordered that Richard and John Becher should pay the amount, with interest and costs, in six months, or in default that the lands comprised in the settlement of 1740 and the mortgage deed should be sold to satisfy the mortgage, and the residue paid to the Defendants.

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The bill then proceeded to state the case as follows:—

That, by the decree in the cause of *Wright v.*

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*Becher*, there was no power granted to the officer of the Court to take an account of prior incumbrances, or to sell any part of the mortgaged premises for the payment of the prior charges due to the said William Evans and wife, and that by reason of no such account being authorised, and of the several contrivances thereafter alleged, Richard Becher was enabled to receive and apply to his own use a sum of 1889*l.* 13*s.* 9*d.*, as therein-after alleged, in consequence of some secret and underhand agreement entered into by him with James Bernard.

That the cause of *Evans and Wife v. Becher* was collusively prosecuted, and without any regard to the interests of the said John Becher the younger, who was, pending the same cause, a minor, and did not attain his age of twenty-one years until the month of March 1793; and that Richard Eyre, the surviving trustee of the term of ninety-nine years, died pending the said cause, and the same suit was never revived against his personal representative; and that, although John Becher the younger was a minor, no proofs were made against him in the same cause; and by the final decree in that cause, any surplus of the proceeds of the sales thereby directed to be made was ordered to be paid to Richard Becher, the tenant for life.

That the suit, instituted by Richard Wright, was in fact collusively and fraudulently prosecuted by the said James Bernard, who, it was alleged, had previously purchased up the mortgage debt of Richard Wright, and was the real Plaintiff, and prosecuted the same suit by an attorney of his own nomination; and that the same was prosecuted

without any regard to the interests of John Becher the younger, and no issue was ever joined therein against any of the Defendants thereto, and no proofs were made therein; and that no day was given by either of the decrees in the two last-mentioned causes for John Becher the younger to show cause against the same.

That Richard Becher was a person of very extravagant habits; and that he not only neglected to keep down the interest of the charges upon his property, but was at all times willing, by raising money in every possible way, to sacrifice the interests of his successors.

That James Bernard, when the said decree was pronounced, resided in the western part of the county of Cork, and had the command of ready money to a great amount; was much engaged in the purchase of landed property; was particularly anxious to acquire estates in the western part of the said county; was a person of great shrewdness, and had been long conversant in various branches of business, and particularly in the purchase of landed property by private sale and under decrees courts of equity.

That Richard Becher also resided in the western part of the county of Cork, and that a close intimacy before and at the time of pronouncing the last-mentioned decrees existed between them; that James Bernard had a perfect knowledge of the property of the said Richard Becher and the particulars of his title thereto, and of the several incumbrances and suits affecting the same.

That upon the decree in the cause of *Wright v. Becher* being pronounced, James Bernard entered into a scheme with Richard Becher to get into

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possession of a considerable portion of the Becher family property, and was in the execution of such scheme greatly facilitated by Stawell Webb, the solicitor of William Evans and wife, and by Thomas Barter, the solicitor of Richard Wright; and that Stawell Webb and Thomas Barter also acted for and afterwards became the confidential solicitors of James Bernard, and James Bernard was thereby and by collusive biddings and sales under the same decree conducted without serving public notice and without competition, enabled to obtain possession of thirteen several denominations at a price not equal to one-fourth of the true value thereof.

That the Respondent was John Becher the younger's eldest son, and heir-at-law and heir-in-tail-general to the estates in the several deeds of settlement of 1740 and 1769.

That a sale was made under the decree in *Wright v. Becher*, on the 17th of May 1783, to John Terry Morgan, as a trustee for James Bernard, of eleven of the said denominations for the sum of 6450*l.*, which sale was set aside by consent on the 21st of May 1783, and also the several other sales thereinbefore mentioned in the two causes of *Wright v. Becher* and *Evans v. Becher*, were fraudulently and clandestinely conducted; and that the several lands which were sold thereat were chosen for that purpose in pursuance of the alleged scheme, as being the best and most valuable of the Respondent's estates, and were sold at a great undervalue, and without due notice by posting or advertisement; and that more than a competent part thereof for satisfying the demands of the Plaintiffs in the two suits were sold under the said decrees.

That Stawell Webb and Robert Reeves carried on their profession of attorneys in partnership; and that Stawell Webb was in the cause of *Evans and Wife v. Becher* the attorney of the Plaintiffs therein, and Robert Reeves the attorney for John Becher the younger, Henry Becher, Thomas Hungerford, and Richard Townsend; and that Stawell Webb and Robert Reeves were the attorneys for James Bernard in effecting the purchase on the 17th of May 1783, of the said eleven denominations; and that no part of the purchase money was ever applied to the liquidation or discharge of the demands of William Evans and wife and Richard Wright; and that no part thereof was ever paid into Court; but in lieu thereof the promissory notes of the nominal purchaser, or of his substitute, were lodged in Court by the consent of the agents of the same Plaintiffs, which agents, it was alleged, were in fact the agents of James Bernard.

That a considerable sum was paid by James Bernard to Richard Becher, as a premium or reward for consenting to the said sales.

That notwithstanding the order of the 28th of May 1785, the lands of Cahirolickenny, Mauldenny, Rathcool, Balteenoughtra, and Letterscanlan were never again set up to be sold, but Francis Earl of Bandon had ever since continued in the possession or receipts of the rents and profits thereof.

That as evidence of the clandestine and private manner in which the sales were effected, and, as it was alleged, with a view to conceal them from the public, and thereby prevent any adverse bidding, the decree, at the suit of Evans and wife,

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was never revived; nor was any proceeding whatever had under the same, between the 16th of November 1782, when the same decree was pronounced, and the order of the 28th of May 1785, which would render necessary a renewal of the said decree; nor was there any notice whatsoever, by advertisement in the newspapers or otherwise, of the said sales, whereby John Becher, and other persons, would have had an opportunity of attending the same; and had a fair and reasonable notice been given of the said sales, numerous bidders would have attended to bid for the said lands, and their full value have been procured.

The bill further alleged, that Francis Earl of Bandon never obtained any grant or conveyance of any of the said lands, in pursuance of the said sales, subsequently to the 28th of May 1785; and that he had, at the utmost, only considered himself as a mortgagee in possession of the said lands; and that James Bernard had demised the lands comprised in the deeds of July and December 1783, for lives renewable for ever, to one John Connor, at a considerable yearly rent, and had paid the representatives of John Connor a considerable sum of money for a surrender of the same lease.

That Francis Earl of Bandon had full notice of the Respondent's rights, and of the irregular and collusive manner in which the sales were carried on; and that all the grants and demises made by him of the said lands were expressly made provided his own interest should last so long.

The bill prayed that the said several sales and every of such sales so made of the said lands on the

2d June 1783, and 11th June 1785, might be declared to be fraudulent and void as against the Respondent; and that the said deeds of the 24th of July 1783, and 20th of December 1783, might be declared fraudulent and void, and be directed to be cancelled, so far as they purported to be absolute conveyances of the said several lands to the said James Bernard; and as to the said lands of Cahirolickenny, Mauldenny, Rathcool, Balteenoughtra, and Letterscanlan, that the said sales thereof so made on the 2d of June 1783, and the subsequent conveyance thereof of the 20th of December 1783, might be declared to be a sale and conveyance of the life estate only of the said Richard Becher to the said James Bernard, and subject to the several charges and incumbrances still due thereon, viz. to the said judgment for 300*l.* so alleged to have been obtained in 1714, to the said mortgage for 1000*l.*, to the said Michael Becher's proportion of the said charge of 5000*l.* created by the said settlement of 1740, and to a charge of 5000*l.* created by the said settlement of the 9th of September 1769; and that the Respondent might be decreed to have been absolutely entitled thereto on the death of the said Richard Becher, and to be then entitled thereto, and to the rents, issues, and profits thereof, since the death of the said Richard Becher received, or which without wilful default might have been received, by the said Francis Earl of Bandon; and that as to the said lands of Barnitonicane, Rattouragh, Keelbronoge, Dunkelly, Derrynalamane, Lassanaroe, Ballyourane, and Ardtenant, that the said several sales thereof of the 2d of June 1783 and the 11th of June 1785, and the said

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conveyance thereof of the 24th of July 1783, might be decreed to be of no other or greater effect than an assignment of the said several incumbrances affecting the same, and so reported due and paid to the several Plaintiffs in the said respective causes of William Evans and Wife against Becher, and Richard Wright against Becher, viz. the sum of 3001*l.* 4*s.* paid to the said William Evans, and the sum of 4108*l.* 5*s.* paid to the said Richard Wright; and that upon and since the execution of the said deed of the 24th of July 1783, the said James Bernard might be decreed to be a mortgagee in possession of the said last-mentioned eight denominations of land, and bound to account for the rents, issues, and profits thereof in discharge of the said several sums of 3001*l.* 4*s.* and 4108*l.* 5*s.*, and the accruing interest thereon; and that an account might be directed to be taken before one of the Masters of the Court, and that it might be thereby ascertained whether any and what sum is now due to the said Francis Earl of Bandon on the foot of the said two principal sums of 3001*l.* 4*s.* and 4108*l.* 5*s.* and the interest thereof, after the due application in discharge thereof of the rents, issues, and profits of the said eight last-mentioned denominations received, or which without wilful default might have been received, by the said James Bernard and the said Francis Earl of Bandon respectively, since the execution of the said deed of the 24th of July 1783; and at what time the said two principal sums were in such manner paid off and discharged; and if upon taking such account it should be reported that any balance was still due to the said Earl of Bandon, that the Respondent, upon payment

thereof, might be at liberty to redeem the said several last-mentioned eight denominations of land, and be restored to the possession thereof; but if, on the contrary, it should appear that the said several principal sums of 3001*l.* 4*s.* and 4108*l.* 5*s.*, and the accruing interest thereon, had been paid off and satisfied by the perception of the said rents, issues, and profits as aforesaid, that the Respondent might be decreed to have been entitled to the possession of the said eight last-mentioned denominations of land upon the death of his said grandfather Richard Becher, or at such other time since then as the said two principal sums, with interest as aforesaid, should appear to have been discharged, or at all events that the Respondent might be decreed entitled to the possession of the said eight last-mentioned denominations of land upon payment of the said several principal sums of 3001*l.* 4*s.* and 4192*l.* 18*s.* so advanced by the said James Bernard and Francis Earl of Bandon thereon; and if it should appear to the Court that by reason of the said marriage settlement of the 13th of February 1784, or any other title or defence which might be relied on by the said Francis Earl of Bandon, that the said Francis Earl of Bandon was entitled to retain the possession of the said lands, or any parts thereof, which were conveyed by the said marriage settlement, then that the Respondent might be decreed entitled to the possession of the said lands of Ratourah and Letterscanlan, which were not contained in the said marriage settlement of the 13th of February 1784, and to such parts of the said lands as the said James Bernard acquired a title to for the life of the said Richard Becher, and to be compensated

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for the other remaining denominations of the said lands so contained in the said marriage settlement, or such parts of the said lands as could not be restored to the Respondent, out of the assets of the said James Bernard; and for that purpose, that an account might be taken of all and every the personal estate and effects of the said James Bernard, and how much thereof came to the hands of the said Francis Earl of Bandon, and in what manner he had disposed of the same, and whether any and what part thereof remained still unapplied in his Lordship's hands; and that all proper and necessary accounts might be taken; and that pending that suit a receiver might be appointed by and under the direction of the Court to collect the rents, issues, and profits of the said lands and premises; that the said Francis Earl of Bandon might bring in and lodge in Court, or in the Bank of Ireland to the credit of that cause, all and every the title deeds, tenants' leases, and other documents and writings which he should confess to have in his custody, possession, power, or procurement.

Francis Earl of Bandon by his answer denied generally, as to his belief, the facts alleged in the bill, and submitted that having been by virtue of the said purchases, and the said settlement of the 13th of February 1784, in possession and receipt of the rents and profits of the said lands for a period of upwards of forty years, he, the Defendant, was entitled to, and he relied on, the benefit of the statute of limitations, as fully as if he had pleaded the same to the Respondent's bill.

On the 26th of June 1832, the following decree was made in the cause by the Lord Chancellor of Ireland: —

That the sale of the lands in the pleadings named, to James Bernard, in 1783, 1785, and 1787, could not be maintained, the sales of 1783 having been set aside with his consent, and the sales of 1785 and 1787 having been effected by private arrangement, under colour of the decrees of the Court of Exchequer, and after the execution of the deed of February 1784, which disabled the parties to the said sales from making title to a purchaser. His Lordship directed a reference to the Master, to inquire and report what sums were paid by the said James Bernard in discharge of any and what demand affecting the lands purchased by him; and in taking the account thereafter directed from the death of Richard Becher, the tenant for life, that the Master should give credit to the Defendant for the sums so paid by the said James Bernard, or so much thereof as should be found unliquidated at the death of the said tenant for life upon the accounts thereafter directed, with interest upon the same from the death of the said tenant for life. His Lordship declared that the said James Bernard was bound in like manner as Richard Becher, the tenant for life, would have been, if he had continued in possession, to discharge the arrear of interest, and to keep down the accruing interest on the principal sum of 3000*l.* secured to Richard Wright, and on the charges of 2000*l.* and 2000*l.* appointed by John Becher to his daughters, out of the rents and profits of the said premises alleged to have been so purchased by the said James Bernard; and directed the Master to inquire and report whether the rents and profits of the estates conveyed to the said James Bernard, from the time he obtained

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possession thereof, were adequate to pay off the arrears of interest due at the time of the sales on the incumbrances mentioned in the said several decrees, and to keep down the interest which accrued on the said incumbrances in the life-time of the said Richard Becher, the tenant for life; and if he should find that they were not sufficient, that he should report the balance of such interest as was due at the time of the said Richard Becher's death. His Lordship thereby declared that the Plaintiff, as against the said James Bernard, on the decease of the said Richard Becher, the tenant for life, became entitled in fee tail, with immediate reversion in fee simple, to the lands alleged to have been purchased by the said James Bernard, which are comprised in the settlement of the 13th of February 1784, executed on the marriage of Francis late Earl of Bandon, subject only to the principal sums which should be found to have been paid by the said James Bernard, and to such interest thereon, if any, as should be found due on foot thereof, upon the taking of the accounts therein for that purpose directed; and in case the rents and profits of the whole of the estates conveyed to the said James Bernard should be inadequate to discharge all the interest due on the said incumbrances at the time of the said Richard Becher's death, that the Master should inquire and report to what proportion of the said principal sums or either of them, and of the arrear of interest, if any should be found due thereon, the lands of Letterscanlan and Ratouragh severally and respectively, according to their several and respective values as compared with the value of the rest of the said premises conveyed to the said

James Bernard, ought to be contributory, and that he should report distinctly and separately as to such proportions. And inasmuch as the Defendant James Earl of Bandon, the personal representative of James and Francis Bernard, relied on his title as purchaser of the lands comprised in the settlement of the 13th of February 1784, his Lordship thereby declared the Plaintiff entitled to the full value of such of the said lands as were bound by the said Francis Earl of Bandon's said marriage settlement, to be paid out of the assets of the said James Bernard, after deducting thereout the balance which should appear due for principal and interest on the taking of the said accounts thereinbefore directed; and directed the Master to take an account of the personal estate of the said James Bernard at the time of his death, into whose hands the same came, and how applied; and that such personal estate, or a competent part thereof, should be applied accordingly. And the said Francis Bernard having by his answer admitted assets of James Bernard sufficient to answer the demands of the Plaintiff, his Lordship directed an account to be taken of the assets of the said Francis Bernard, and also of the rents and profits of the whole of the premises alleged to have been purchased by the said James Bernard, from the death of the said Richard Becher, to be applied, first, in payment of the arrears of interest, if any, and the accruing interest on the said incumbrances, and then to sink the principal sums thereby secured: that the said directions, as to Ratouragh, should be subject and without prejudice to the inquiry thereafter directed in relation thereto. That the lands of Letterscanlan and Ratouragh

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(if the said lands of Ratouragh should not be found to be comprised in the said deed of settlement of the 13th of February 1784) should stand as a security for such proportion of the said incumbrances, and the interest thereon, as should be found to affect the same respectively; and on payment thereof, that the same should be restored to Plaintiff, and an injunction issue for that purpose. His Lordship further directed an issue to ascertain the value of an estate in fee tail, with the immediate reversion in fee simple, of such of the said premises as were comprised in the said settlement, and to ascertain whether Ratouragh was comprised or passed by the said deed of settlement of the 13th of February 1784; and whether the said lands were a sub-denomination of the lands of Barnitonicane; and if not, that an injunction should issue to put Plaintiff into possession in the same way as Letterscanlan. And he thereby reserved costs and further directions.

The Appellant having presented a petition of rehearing, the cause was reheard before the Lord Chancellor of Ireland on the 3d, 4th, and 5th days of December 1832, and on the 14th and 15th of January 1833, upon which rehearing the Lord Chancellor, on the 25th of May 1833, affirmed his said decree of the 26th of June 1832.

By a leading order of the 25th of May 1833, made in this cause, it was ordered that the Respondent should commence a feigned action in his Majesty's Court of King's Bench in Ireland against the Appellant, for the trial by a special jury in the county of Cork of the following issues; that is to say —

First, "What is the value of an estate in fee

“tail, with the immediate reversion in fee simple,  
 “of such of the said premises in the pleadings  
 “mentioned as are comprised in the settlement of  
 “the 13th of February 1784, in the pleadings also  
 “mentioned.”

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Secondly, “Whether the lands of Ratouragh in  
 “the pleadings named are comprised in or passed  
 “by the said deed of settlement of the 13th of  
 “February 1784.”

“Thirdly, “Whether the said lands of Ratou-  
 “ragh are a sub-denomination of the lands of  
 “Barnitonicane.”

And the Judges before whom the trial should be  
 had were thereby desired to certify to the Court of  
 Chancery the verdict that should be given thereon ;  
 and his Lordship reserved all further directions  
 until the return of the Judges’ certificate, where-  
 on such further order would be made as should  
 be fit.

The action having been tried on the 14th of  
 August 1833, Mr. Justice Vandeleur, one of the  
 Judges of the Court of King’s Bench, made his  
 report, dated the 11th of November 1833, and  
 thereby certified that after hearing the proofs and  
 evidences on both sides, the jury returned their  
 verdicts on the several issues in manner following ;  
 that is to say—On the first issue, viz. “What is the  
 “value of an estate in fee tail, with the immediate  
 “reversion in fee simple, of such of the premises  
 “in the pleadings mentioned as are comprised in  
 “the settlement of the 13th of February 1784,  
 “in the pleadings mentioned, that is to say.”

Then followed the values of the lands found by  
 the verdict, the leases made by the Becher family,  
 and the rents thereon, concluding thus : —



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“ We find the value of the whole of the lands in the pleadings mentioned to be nineteen years’ purchase.

“ And on the issue, whether the lands of Ratou-  
ragh are a sub-denomination of the lands of Bar-  
nitonicane or not, we cannot agree.

“ And on the issue, whether the lands of Ratou-  
ragh are comprised in or passed by the deed of  
settlement of the 13th of February 1784, we  
cannot agree.”

By an order of the Lord Chancellor of Ireland, bearing date the 30th of November 1833, and made in this cause on further directions, it was ordered that it should be referred to the Master to inquire and report what was the value of the several leases made by the Becher family to which the said lands were then subject, in order that the same might be deducted from the value of the lands calculated at nineteen years’ purchase, according to the yearly value at the then present day; and a new issue was directed to be tried as to the said two points on which the former jury did not agree.

On pronouncing the decree in the cause the reasons for the judgment were delivered as follows by Lord Plunket, Lord Chancellor of Ireland: —

“ In this case I regret that I did not give my judgment when the facts were more completely in my recollection. The cause came on to be heard on pleadings and proofs. The bill was filed in the year 1828 against the late Earl of Bandon, and subsequently revived against his son, complaining of sales which had been made under decrees of the Court of Exchequer, and seeking that they should be set aside, or, in the alternative, relief in being

restored to the estates, or to have compensation out of the assets of James Bernard.

The facts in the case, so far as they are material to sustain the decree which I am about to pronounce, are not voluminous. A great number of facts were stated, but they are not necessary now to be adverted to for the purpose of the Plaintiff's case.

It appears that in the year 1740 a settlement was entered into, under which John Becher became tenant for life, with a power of charging 5000*l.* for younger children, with remainder to his first and other sons, subject to a power to raise these charges, which was executed by him; and he appointed the sum of 2000*l.* each to his two daughters, Mrs. Evans and Mrs. O'Donovan; as to the remaining 1000*l.* it is not material to the present case, but it became vested in Richard Becher.

Under this settlement John Becher, being tenant for life, with remainder to Richard Becher, John and Richard executed a mortgage for 3000*l.* to a person named Wright, and on that occasion a recovery was suffered; and in the deed a power of revocation is given to John and Richard to settle it to other uses; and by deed of 17th September, 1768, John is made tenant for life, with remainder to Richard for life, with remainder to the first and other sons of Richard in tail; and in the year 1769, in pursuance, a settlement was executed, and the estate conveyed to John for life, with remainder to Richard for life; and the second John, son of Richard, becomes tenant in tail.

In 1782 Richard and the second John, being thus seised, a bill was filed in the Court of Exchequer on behalf of Elizabeth Evans, to raise the

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sum of 2000*l.*, and a decree had, and a report obtained in November, 1782, ascertaining the sum due to the plaintiff, and the decree was to sell the term in discharge of that sum. In this suit it appears that Stawell Webb was the attorney for the Plaintiff, and Mr. R. Reeves attorney for the minor John, and Dennis for his father Richard; and a sum of 566*l.* is in this cause ascertained to be due for interest, and interest is also given on the consolidated sum.

A second bill was filed in May, 1782, by Wright, the mortgagee. In that suit there was a decree and a report for 3583*l.* 2*s.* 7½*d.*, and there is ascertained to be due for interest a sum of 583*l.* This decree in Wright's cause also directed the sale of the fee; in Evans's cause it was for the sale of the term; both of these decrees were right so far. These two decrees having been so obtained, three denominations were sold to one Morgan, who appears to have purchased in trust for James Bernard, the father of the Defendant: the sum for which they were sold was 950*l.*; and on the same day three other denominations were sold to Morgan, in trust for James Bernard, for a sum of 850*l.*, making together a sum of 1800*l.*; and on the 20th of December, 1783, a conveyance was executed to James Bernard. Previous to the execution of this conveyance to Bernard, seven other denominations were sold to Morgan for 7000*l.*, also in trust for the same James Bernard; these sales made up 8800*l.* There was due in the cause of Evans 3001*l.* 4*s.*, in the cause of Wright there was paid 3998*l.* 16*s.*, thus making up the sum paid 7000*l.* With reference to the value of the land, it is said that this sum was suffi-

cient. But it appears that the sum of 1800*l.* was not paid by Bernard in 1783. Yet he entered into possession of all the lands ; and being in possession of them, in February, 1784, he executed a settlement on the marriage of his son, the late Lord Bandon, of all these denominations ; and this deed was registered on the 18th of May, 1784. I observe that by this settlement, so executed, the denominations sold for 1800*l.*, and for which nothing was paid, were included therein, as well as those sold for the 7000*l.*

A bill was then filed for the sale of the remaining denominations by O'Donovan, who was married to the second daughter, and it was filed by Stawell Webb, the solicitor who was concerned in recovering the charges of the other daughter ; and it was a proceeding which, I must say, was most improvident as to the rights of his client, and particularly as to the rights of the minor. Now all this appears to have been done by the consent of the parties. It was all an arrangement amongst themselves, and so much to the injury of the minor that he now looks for compensation.

Under these circumstances James Bernard entered into a consent in Wright's and the other cause to set aside the previous sale, in order to have a new proceeding, as if under the authority of the Court, to make out a title to that very interest which in 1784 he had included in the settlement which he had registered ; and these proceedings were in order, as he hoped, to make out a title to the whole. Accordingly, on the part of the late lord, and of the present lord, the original proceedings of 1783 being avoided, and proceedings having been taken under this arrangement, four denominations were

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bought of the thirteen that were sold in Wright's cause for 4092*l.* 10*s.*, the amount of Wright's decree being 4108*l.* 9*s.*; and so there was a balance of 84*l.* 13*s.*, which was paid over to Richard Becher, who was not entitled to receive it. It appears that this was supposed to be paid by Lord Bandon. But it was not paid, but merely has a reference to the proceedings in 1783. It is made up by a receipt given by Thomas Barter, the attorney for the Plaintiff, for 4108*l.*, (3998*l.*, he had received in August, 1783); and thus they make this out to be a satisfactory proceeding under the old sale. On the same day four other denominations are sold for 3001*l.*, the amount of Evans's demand. Now the sums alleged to have been paid in 1785 amount to 7200*l.*, the exact amount of Evans's and Wright's demand, the sum of 200*l.* being for costs.

Then the proceedings in the O'Donovan cause are treated in a similar manner by Bernard. In 1787, four denominations are set up, and the two are purchased by Bernard for a sum of 1600*l.*, as if it was an effective proceeding in the O'Donovan cause; and that sum, with the 7200*l.*, make the sum of 8800*l.*, the sum originally bid for the thirteen denominations of land. That this can be sustained as a proceeding under the authority of the Court of Exchequer, is quite impossible to maintain. I therefore put it out of case.

There is no question whether this Court has a right or not to interfere. I do not interfere with any decree of the Exchequer; the proceedings here were abandoned, and they got up a new proceeding to have it believed to be the fair proceeding of this Court. But it is quite a mockery.

It is said no advantage has been taken; that there

has been no undervalue. I do not proceed on that ground; but I say the person who has a right to the protection of the Court, the minor, has not received it: he could only get that protection under sales conducted openly and on fair competition; but I have as convincing evidence as could at this distance of time be produced, that the sales were not had in that way in which the highest value could be got for the lands.

But it is argued that this is but a formal objection, and that after so great a length of time it should not be noticed; the bill was not filed till 1828, and the transactions were in 1785 and 1787; and that the Court should not at such a distance of time interfere on a mere formal objection; but it is more than a formal objection, and the proceedings were taken in the first year that could be; for it appears, first, that the fee-simple of an estate was sold in payment of a sum charged only on a term; that is not merely an error, it is a gross fraud. It is said that this was an advantage to the inheritance; it might be so in a case of fair competition in the sale. There is then a decree for a sale of the term, and the same money paid for the fee as was paid for the term. I find further, an arrear of interest in this transaction. Evans's and Wright's mortgages together have an arrear of interest amounting to 1600%. I don't say that that is an error which could affect the purchaser; but I allude to it to shew the unjust way in which the estates were sold by the party who should have protected them. Again, part of the purchase money (a small part, I admit) was paid to the tenant for life, who had no kind of right to any part of it. Again, when one sale would have been sufficient,

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the estate is put to the expense of three. And again, in 1783, when five denominations are sold for 1800*l.*, that sum is not paid; but James Bernard enters into possession of these five denominations, though he had paid nothing for them. Again, the interest is charged to the year 1787 against the parties. And further, when the proceedings are set aside in 1785, they are set aside without costs given to the minor, though it is admitted they were quite erroneous as to him. No costs are given to him, but the costs are charged against him. And further, there is a repetition in 1785 of the former sales, when they knew there was a deed under which they could not make title; and interest is charged to a time when it ought not to have been charged. Without making any imputation on the moral character of the persons engaged in these transactions, I must say that they appear to have been in the view of a Court of Equity completely fraudulent, and cannot be sustained.

The only difficulty that I had at all in the case was the length of time which had passed since they occurred, and that the party was seeking relief on a transaction which occurred at so distant a period as 1785; but then we must consider that John Becher died in 1778, and his son Richard then became tenant for life, with remainder to John, the father of the Plaintiff, the tenant in tail. Richard, who was tenant for life, lived until 1825, and therefore the remainder did not vest in possession until the year 1825. John died in 1820. It is not material, but his estate never vested in possession; but the title of the present Plaintiff did not accrue till 1825, and the bill was filed in 1828: therefore, as far as the tenant in tail is concerned, laches

cannot be imputed to him ; so there is no difficulty in that part of the case.

It has been argued that the existence of this estate for life does not enable the tenant in tail to proceed to impeach these proceedings, nor is it competent to him to file his bill ; but I am relieved as to that point upon the facts of this case. If, this was a bill to impeach this decree for fraud against the minor, there might be some question whether he, being merely tenant in tail, was so entitled. I am not prepared to say that the tenant in tail would be protected. I don't know whether there is any authority on the point.

The case of *Giffard v. Hort*\* has been adverted to, but I cannot find that this point was decided in *Gifford and Hort*. It was argued in that case in the Lords that *Gifford* had the right. I don't know what was the final result. I am told that the decree in the Exchequer was reversed. I believe it is so ; but the grounds of the decision in that case are only in a note to Messrs. Schoales and Lefroy's Reports before Lord Redesdale. That report of these proceedings in the Court of Exchequer I cannot consider to be an accurate statement from which anything is to be deduced ; for it supposes that if the decision is unsustainable, it is only on the ground of the acts between the parties making it appear a substantive mortgage ; but the argument is of no avail. I recollect the argument in that case, that a tenant in tail might file a bill in the lifetime of the tenant for life, and that he did not do so ; but it was answered by shewing that laches were not attributable ; and they likened the case to where a fine is levied by a tenant for life,

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\* 1 Sch. & Lef. 386.



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and the reversioner or remainder-man does not avail himself of the forfeiture; the answer is given to that in the note, which says, "The case of a fine "is quite different, for the party could not make "an entry;" but that is not true, for there is nothing to prevent an entry. But this is not to decide this question; and there is nothing to decide here as to the tenant in tail being bound during the life of the tenant for life. I give no opinion upon that.

Again, I say I am not meddling with the sales of the Court of Exchequer. I consider that James Bernard entered into these lands by the only good title he had, viz. an assignment of these charges; and then the question is, whether there is power to redeem. The difficulty in a mortgage case is, whether the tenant in tail is bound to redeem during the life of the tenant for life; it was the opinion of Lord Manners, in *Blake v. Foster*\*, that length of time did not run against a tenant in tail. It is said that that was overruled in the Lords, but there is no report of any such decision in the books. I have reason to know that the decree was never reversed, at least on that ground; but it is said in some of the text writers that the point was decided in another cause; and the case of *Harrison v. Hollins*, in 1 Simon & Stewart, 471., is cited; but that case is not to be considered as deciding it. The marginal note goes the length of saying that time would run against the tenant in tail; but if we look into the case, we find it does not go so far. There is no report of the argument, no statement of the grounds on which the cause was decided; it states that it was decreed that the bill

\* 2 Ba. & Be. 387.

should be dismissed: but it is a decree where no reasons are given, but merely saying that the bill is dismissed. Is that a decision to overrule the opinion of Lord Manners, in *Blake v. Foster*, and the very sound argument he made in that case? It is said it would be inconvenient to be entangled by consequences of this kind; but if he wants to convert it into an indefeazible estate, his only mode of doing it is by bill: length of time may give him a right, but not the right originally stipulated for. If he is to have an incidental right, he must have it subject to the same difficulties any one else would have, relying only on the length of time. But further, in this case the right of the mortgagee in prejudice of the remainder-man, is only in consequence of the settlement here being of an equity of redemption. The case of *Price v. Copner*, in 1 Simon & Stewart, 347., will be found not immaterial. It is a case of husband and wife. It is there decided that she and the heirs may redeem in twenty years after the death of the husband. Apply that to the present case. I have already mentioned the deed by which the mortgage was created; there was a revocation; and being by the same deed, this is not a settlement merely of the equity of redemption, but growing out of the same deed that created the mortgage; therefore it is not bound by this case.

Another point was argued, that length of time should not run till the remainder-man had notice of the fraud. There is no evidence that he had any notice here; but it is material to consider that no day was given to him, as a minor, to shew cause; there is proof on his side that he had not notice; he is deprived of notice by this erroneous

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decree. But I am not called on to decide this point. Here a party enters into possession under a mortgage title, and taking advantage of the embarrassments of the tenant for life; that is the point on which I found my decree. From 1785 every person deriving from Bernard was the person to keep down the interest; and so far as redemption is considered, the Plaintiff puts it that he is not bound to file a bill, and this is borne out by a case \* (I forget the name of it) in Anstruther; the decision is received by the same court which first made it, and on the strength of that decision I found my decree.

But for the settlement of 1784 all would be perfectly clear. I think it is conceded by the Plaintiff that the present Defendant, to protect himself (as the Plaintiff has no remedy against the lands), must look to the assets of James Bernard, which it is admitted are abundantly sufficient; and the Plaintiff is satisfied to resort to the assets instead of the real estates. I am therefore not called on to say any thing as to the assets of Francis Earl of Bandon.

Now I believe I have only one branch of the case to advert to; and that is as to the two denominations, Letterscanlan and Ratouragh. It is admitted that as to Letterscanlan, it was not comprised in the settlement of 1784; therefore, as to this denomination, the Plaintiff has relief. The question whether Ratouragh was or was not comprised in the settlement, must be a subject of inquiry; and according to the report on that inquiry I will give relief as to that denomination."

\* Probably *Corbett v. Barker*, 3 Anst. 755.

The appeal was from the decree of the 26th of June, 1832; the order of the 25th of May, 1833; the order of the 25th of May, 1833, and the order on further directions of the 30th of November, 1833.

For the Appellant, *Mr. Tinney* and *Mr. Pemberton*.\*

*Mr. Tinney*, after stating the case.—No question was raised below nor any evidence adduced to shew that the lands were sold at an under-value. Here was evidence on the part of the Appellant that the full price was given. The lands in the possession of the purchaser cannot be reached. The decree is for damages and punishment; and the question is, whether after forty-five years have elapsed, the assets of James Bernard can be liable for these damages. A Court of Equity cannot give damages; and even if it could, the price given for the estate was the full price; therefore no damages are due, and none should have been given.

*Lord Brougham*. — The question arose in the Court of Exchequer; it is set aside in the Court of Chancery. That, I believe, is your first objection. How is it answered?

*Mr. Tinney*. — They say, for one ground, that the Appellant assented to the irregularity of setting aside the first sale; but he could not assent, for he had no power to do so. The Respondent cannot proceed without setting aside the proceedings in the Court of Exchequer. In the judgment of the

\* *Lord Brougham*, early in the argument, stated the inconvenience of the Appellant's beginning where the Respondent was the Plaintiff below, relying on a case of fraud. In *Small v. Attwood*, he said, he did not understand the case till after three days had been occupied in opening. He was of opinion that the Respondent ought to begin.

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Lord Chancellor of Ireland below, he says, "They did not commit any moral fraud, but they got up a series of sham sales." But the purchaser has nothing to do with the irregularities in the proceedings. The objections to the decree are numerous. The Court of Chancery had no jurisdiction to reverse, as it did in substance, the decree of the Exchequer. As to damages, if any could be given, it should only have been for so much loss as was created by the difference between the value at the date of the transaction and the price given upon the sale; the present value of the lands cannot be the measure of damage. The portions must then have been raised by sale of the term. The objections are partly formal, and partly substantial. Who is the party injured? Not the issue in tail, but the tenant in tail; the party who could have acquired the estate. The damage, if any, was sustained by John Becher, the father of the Plaintiff. Another objection arises from the lapse of time. A tenant in tail in remainder is barred by lapse of time after an act which destroys the settlement. Here the estate tail is a mere equity of redemption, under the mortgagee in possession.

In *Giffard v. Hort*\*, Lord Redesdale states his impression that the decree against a tenant in tail or a tenant for life before issue would bind the remainder-man. There is evidence in the suit that the full value was given for the estate; and as to the alleged irregularities, in *Lloyd v. Jones*† there were far greater irregularities, but it was held that they did not affect a purchaser

\* 1 Scho. & Lef. 386.; see p. 407.

† 9 Ves. 37. See also *Curtis v. Price*, 12 Ves. 89.

under a decree. The sale cannot be set aside, unless it can be impeached as fraudulent. No fraud is suggested, but that the solicitor of Bernard was the solicitor of the Plaintiff; but that rests upon suspicion, not proof. It is an accident; there is no evidence of connection between the parties. The omission to give the infant a day to shew cause is no ground for setting aside the decree. *Bennett v. Hamill*.<sup>\*</sup> A decree taken by consent, and without a reference, has been held to bind an infant. *Wall v. Bushby*.<sup>†</sup> The same doctrine has been applied in the case of a decree against a *feme coverte*, for the sale of her separate estate, especially after lapse of time and acquiescence. *Burke v. Crosbie*.<sup>‡</sup> So where the surplus of the purchase money was by the decree directed to be paid to the tenant for life. *Lightburne v. Swift*.<sup>§</sup> As to compensation, if any be due, it must belong to the personal estate of John Becher.

The claim, if otherwise well founded, would be excluded by lapse of time, which begins to run from the time when the right to file a bill occurred; as soon as a right of entry arose upon an equitable estate in remainder, though unconnected with the particular estate. *Cholmondeley v. Clinton*.<sup>||</sup> This right was in J. Becher. So it is where a mortgagee enters in the lifetime of the tenant for life.

<sup>\*</sup> 2 Scho. & Lef. 566.

<sup>†</sup> 1 Bro. C. C. 484.

<sup>‡</sup> 1 Ba. & Be. 489.

<sup>§</sup> 2 Id. 207.

<sup>||</sup> 4 Bligh, O. S. 118. See *Dillon v. Parker*, 1 Swan. 359., Jac. 505., 7 Bligh, N. S. 325.; *Whalley v. Whalley*, 3 Bligh, O. S. 1.; *Foster v. Blake*, 4 Bligh, O. S.; *Bennett v. Colley*, 5 Sim. 181. 3 M. & K. 225.; *Salisbury v. Bagot*, 2 Swan. 603.; *Kennedy v. Daly*, 1 Scho. & Lef. 355.; *Smith v. Clay*, 3 B. C. C. 638. note; *Harrison v. Hollings*, 1 Sim. & Stu. 471.

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For the Respondent, *Mr. Bickersteth* and *Mr. Jacob*.

The sale is invalid as against the Respondent, on the ground of irregularity in the proceedings to which Bernard was a party or privy, and which amount to fraud in equity. If the lands cannot be reached, the value must be answered out of his assets. The value of the estate is to be taken at the time when the question is raised, upon the same principle as in cases where stock has been improperly sold out the party must replace it, or pay the value at the time of the demand. In *Wilson v. Moore*, the wrongdoer was ordered to replace stock at an advance of 30 per cent. The party injured must be placed in the same situation as if no wrong had been done. *Bennett v. Colley*.\* The jurisdiction is clear. The Court of Chancery does not reverse the decree of the Exchequer, but makes an independent decree upon a distinct ground, viz. fraud upon a party injured by the proceedings in that decree.

As to length of time, the bill was filed shortly after the decease of the tenant for life. The deeds were valid against the parties who executed them; and Bernard and those who claimed under him were in possession as mortgagees, and stood in the right of the tenant for life. Those characters being united, time could not run against the remainder-man, who could not redeem while the tenant for life was in existence. *Corbett v. Barker*.† Twenty years' adverse possession may bar a claim, not so where the possession is consistent with the title. *Ravald v. Russell*.‡ The te-

\* 5 Sim. 181.

† 3 Anstr. 551.

‡ Young, 9.

nant for life has the first option to redeem. So in the case of fraud; time does not begin to run until the fraud is discovered, and here it does not appear that the fraud was discovered before the filing of the bill. The bar of twenty years rests upon the principle of adverse possession, which cannot be where the title of the party possessing is the same as that of the claimant. In *Gore v. Stackpoole*\*, the right of a remainder-man was established after a lapse of sixty-three years, because he could not proceed during the interest of the tenant for life. *Whalley v. Whalley* was not a bill by a reversioner against a party in possession, but to set aside a deed alleged to have been obtained by fraud, and which might have been enforced within twenty years after the fraud discovered. *Bennett v. Colley* shews that time does not run until the party has full and efficient remedy. In this case no right accrued until the death of the father.

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*Lord Brougham.* — This case, which has been argued at very great length,—but of the length of which argument I certainly have no reason to complain, and I do not intend to offer any complaint upon it on account of the importance of the principle involved in the decision, and on account of the great amount of property which is at stake,—is now ripe for your Lordships' disposal; but when a decree has been pronounced by a Judge of the great learning, experience, and talent which is possessed by my noble friend, the present Chancellor for Ireland, after a very ample discussion before him, and after the very great pains bestowed by him, and more especially when that judgment

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\* 1 Dow. 18. and MS. Cases.



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is fortified by the able, and I will say, in all but one particular, the elaborate reasoning upon which it is grounded, and by which it is prefaced, it becomes a very anxious matter for any one who has to decide in this court of last resort on appeal, to apply his mind to the consideration of the judgment in a cause so argued, and a judgment so well considered and so fully reasoned.

In such a case the probabilities are always in favour of the soundness of the view which has been taken by the Judge, rather than against it. The feeling (if a judge can feel inclination) must always be against reversing the decision, or even in any material respect altering it; but nevertheless it is the duty of your Lordships, and especially of those members of your house who profess to apply themselves to these matters, to have no regard to the authority of the person pronouncing the decree below, or to the apparent pains taken with that decree. They will discharge that duty without respect to any thing but the reasons upon which the merits of the case of which they are to dispose should proceed.

Upon these views, and under the guidance of this feeling, and no other, it is that I have now to apply my mind in the best way I can to the decision of the question; and, regarding the importance of the matter discussed—regarding those one or two points upon which I do not feel satisfied—and regarding also the stake, independent of the respect which I entertain for the jurisdiction in which the matter was instituted, I shall request time before I make up my mind. In the present stage I propose to throw out one or two observations, which will dispose at least of some portion of

the case. The first ground of appeal, as to the jurisdiction, was abandoned by Mr. Pemberton, but for the sake of argument, and no more; it was laid out of view, in order to arrive at what was said to be sufficient ground for supporting his appeal. This part of the argument assumes the appearance of form; though I agree with Mr. Tinney, if well grounded, it disposes of the whole question, and therefore can hardly be said to be form, for it rather goes to the whole substance of the case, if well founded at all, than to any error in mere form. It is said that the whole of this proceeding springs from the decree of the Court of Exchequer in Ireland. It is contended that a decree pronounced by a court of competent jurisdiction between parties legally and formally before it, in a matter of which it has a title to take cognisance, cannot be questioned in another court of co-ordinate jurisdiction, that is to say, the Court of Chancery has no power to be canvassing a suit which has been decided in the Court of Exchequer. That is a general proposition to which I assent under ordinary circumstances. On the other hand, as it was argued, the proposition must be qualified in this respect, that you may object to the validity of the decree in the other court, provided it was pronounced through fraud, through contrivance, or through covin of any description; if it was a mode of proceeding not real and substantial, but collusive and fraudulent, a specious suit only between the parties who were not really adverse parties, or who had no right to present themselves as standing *in foro* as parties to the suit. This is a proposition as undeniable as the former; it is not less true than that the Court of Chancery has no

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right to review the decrees of the Court of Exchequer, or the Court of Exchequer to review the decrees of the Court of Chancery, or any court of co-ordinate jurisdiction to interfere with another court; and nothing but your Lordships' house, which is the court of last resort, can give redress under an appeal from an inferior court. In co-ordinate courts there can be no review at all. But if the decree has been obtained by fraud; if the whole suit has been concocted from the beginning to the end in fraud, that decree shall avail nothing for the party obtaining it in the further prosecution of his claims, and it shall avail nothing against the party affected by it, and against whom it was set up, to the defeating of his right, to the destruction of his property, or to stay the prosecution of the claim against those who have so done. For these propositions there is undoubted law, recognised in daily practice, and not only undeniable, but they exist independently one of the other, and stand together consistently. I need not remind your Lordships of the manner in which the second of these propositions has been argued, of the solemnity with which it was decided in this house, or rather in the adjoining chamber of this house, in Westminster hall, in a case\* that was elaborately argued before a competent judicature. A suit was brought in the Court of Arches for dissolving a marriage, and a sentence pronounced. It was argued that nobody could controvert that sentence, which sentence was alleged to be binding every where. On the other hand it was argued by Mr. Wedderburne that you could make no binding decree but in a real suit, between parties really adverse, and when

\* Duchess of Kingston's case, *State Trials*, vol. ii. p. 262, *Dom. Proc.* 16 Geo. 3.

there was a real subject matter, and by a court legally deciding upon that subject matter, and if it has not all these qualifications it is no decree ; that was the substance of the argument. It was argued by counsel, both from the civil and common law bar, and so determined by the then Lord Chancellor, with the assistance of all the Judges of the other courts. This was only declaratory, and not creative of the law. It was the settled law, recognised by the highest authority. Upon the whole I am of opinion that this case falls, to a certain degree, within that description of cases. The argument is, that this is an attempt to set up the Court of Chancery in judgment upon the Court of Exchequer ; that the Court of Chancery was so far bound by what passed in the Court of Exchequer, as to have no right to give the party seeking relief there that relief which he sought ; that it has no right to assume jurisdiction upon an error in the Court of Exchequer. But it is not an irregularity, it is not an error in substance which was complained of. It is because the whole proceeding was collusive, and mixed up with fraud from the beginning to the end ; it cannot be taken to be a proceeding leading to a judgment, consequently all that was done in the Exchequer must be passed by as nothing. This brings me to the consideration of the other point which was taken in argument ; and here I think, upon two grounds, it will be necessary for me to take time for further consideration. Those two grounds are, first, in what manner the compensation alleged to be due ought to be awarded ; and secondly, what is the importance of the length of time which has been suffered to elapse. Upon these grounds it is that I wish to have the

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opportunity of somewhat further consideration; whatever the inclination of my opinion may be, I, at all events, cannot discover the reasons upon which it was disposed of in the way in which it has been disposed of by the noble Judge who decided it in the court below: he comes to these points suddenly at the conclusion of his judgment; he does not explain or argue the points; he makes a sudden transition from the former part of the case and the exposition of the argument to the conclusion; and without stating exactly whereupon the conclusion rests—upon the subject of the time that intervened which is material to that conclusion in the judgment, he says nothing, but he pronounces on the fact with respect to the mode of giving compensation. There is some lapse in his judgment, there is no continuity: he only says “for these reasons I am of opinion that the Plaintiff should have the relief he prays;” he cannot quite accurately say “for these reasons” he is entitled to this specific relief; for the reasons, though they would relate to the thing, they do not lead to this particular relief rather than to the other: that is the *hiatus* in the reasoning, otherwise accurate, as might be expected from the high source from which it came. It is for the purpose of considering what the reasoning may have been that I wish for further time, lamenting as I do that there is this *hiatus* in the reasoning. That is the first subject to which I shall direct my attention. If the reasons were not detailed there is no doubt they existed, and if the matter is not quite clear before us, yet it may be sufficiently so to support this judgment. Upon the important circumstance of time I confess I lean very much in

favor of the argument of the Respondent, but upon that I think it is necessary with other points in this case to take further time for consideration.

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*Lord Brougham.* — This is an appeal from a decree of the Lord Chancellor of Ireland. It involved two points, on one of which I had no doubt, the other I requested time to consider. I have considered the question, and I have had some communication with my noble and learned friend, on account of his not having given the reasons for the judgment, as applying to one branch of the case. He stated the reason why the case should be decided in one way, and why it should go in favor of one party, but upon one branch, which was argued why it should go in favor of one party, in one mode rather than another, undoubtedly the learned judge did not give his reason. I formed a conjecture what his reason was, and on conversing with my noble and learned friend, I found that to be the reason operating on his mind. He had a distinct recollection of the case : it was a case on which he had taken very great pains ; and I found on consulting him that he had proceeded on the same reasons which had occurred to me, not knowing my view of it. He had taken the same view I have taken.

I do not mean to say the case is without difficulty, in any view I can take of that branch of the case on which the reason was not expressed. At the same time I have not so clear and strong an opinion as would justify me in recommending to your Lordships to reverse. I feel bound therefore to proceed upon the ground on which the Courts proceed in other cases, in giving their decision on

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an appeal, where they do not see sufficient reason to object to the judgment of the Court below. In the case of every appeal from the Master of the Rolls, or the Vice-Chancellor, or on ultimate appeal from either of these Courts, if the matter should nearly balance on some point of fact, and, in some instances, on points of law, unless we see a very strong ground, and are very confident that the judgment below is wrong, we ought not to reverse it: that is the principle on which your Lordships uniformly act, and it is a very sound and judicious principle. Without going further into the case, I move your Lordships that the judgment be affirmed, but evidently it follows from that which I have stated, that no costs ought to be given.

Judgment affirmed.

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On the several points in this case, in addition to the authorities in the text, see *Bicknell v. Gough*, 3 Atk. 577.; *Carew v. Johnson*, 2 Scho. & Lef. 280.; *Bennet v. Hamill*, Id. 577.; *Coldclough v. Sterum*, 3 Bli. O. S., 185. 189.; *Gore v. Stackpoole*, 1 Dow, 30. 51., & MS. Cases; ——— v. *Crosbie*, 1 Ba. & Be. 501.; *O'Brian v. Greeson*, 2 Ba. & Be. 323.; 12 Ves. j.; 3 Atk. 64.; 3 Meriv. 211.; as to the protection of a purchaser under a decree, and how far he is affected by intermeddling in a suit: *Fletcher v. Tollett*, 5 Ves. 3.; *Lightbourne v. Swift*, 2 Ba. & Be. 210.; B. C. C. 488.; *Scott v. Dunbar*, Molloy, 446.; *Kemp v. Westbrook*, 1 Ves. sen. 278.; *Hovendon v. Lord Annesley*, 2 Scho. & Lef. 634.; on acquiescence and lapse of time: *Cann v. Cann*, 1 Vern. 480.; *Todd v. Gee*, 17 Ves. 273.; *Gwillim v. Stone*, 14 Id. 128.; *Denton v. Stewart*, 1 Cox, 258.; as to decree for damages, 2 Eq. Ca. Abr. 303.; Jacob, 632.; 2 Cox, 386.; 1 Atk. 48.; as to day to be given to minor, *Lansdown v. Beaman*, Molloy's Rep.; *Mullins v. Townsend*, 5 Bli. N. S. 567.

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## ENGLAND.

(COURT OF CHANCERY.)

The Honourable ROBERT KING - *Appellant*;THOMAS HAMLET - - - *Respondent*.

K., a young man about twenty-four years of age, having under a settlement an annuity of 800*l.* during the joint lives of himself and his father, and a life estate in remainder, subject to his father's life estate in lands comprised in the settlement, entered into a negotiation with H., a silversmith and jeweller, to effect a loan of £5000, which H. declined, but offered to sell him goods, which was done accordingly, K. selecting plate, jewels, trinkets, &c. out of the shop of H., at the shop prices marked upon them, to the amount of £8000; to secure the repayment of which sum with interest at £5 per cent. from the date of the transaction, a mortgage was executed by K. of his life interest in remainder with a covenant to insure his life. H. in his mortgage was described as of C. Square, Esquire, and the consideration was stated to be for a debt owing by K. to H.: as collateral security warrants of attorney, to enter up judgment in England and Ireland, were executed, and judgments entered up accordingly. A promissory note for the amount was also signed by K., in which the consideration was stated to be goods sold and delivered. Pending the treaty K. had sold or charged his annuity to the full amount, and then had no other present income.

The goods were not delivered until about four months after the selection, to give time for registering the mortgage in Ireland. Upon the delivery of the goods K. placed them in the hands of R. an auctioneer, to secure the repayment of £2500 borrowed, with power to R. to sell by auction in default of repayment.

Before the execution of the mortgage L. the father of K. was informed of some transaction of loan pending between his son and H. and the solicitors of L. who, on that occasion, acted as the solicitors of K., required H. to take back the goods and



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deliver up the securities, which H. refused to do. Thereupon a bill was filed by K., praying that the securities might be delivered up, and offering to return the goods, and in the mean time to deposit them in court. This was not done; but the goods were sold at a public auction, under his power by R., for a sum of £3482, a small part being purchased at the sale by K. The bill was afterwards, in July 1829, dismissed for want of prosecution. In July 1830 another bill was filed, stating the same case as in the former bill, charging among other things that the goods were sold to K. at an exorbitant overcharge, and praying delivery of the securities on payment of the sum for which the goods were sold, with interest, or upon such other terms as the court should think just. The bill also prayed an injunction to restrain negotiation of the promissory note, &c. This injunction was granted by order of the Vice-Chancellor, and upon motion to discharge this order it was upheld by the Lord Chancellor.

By evidence in the cause it appeared that L., to a certain extent, encouraged the transaction between his son and H., having employed agents to bargain with H., or in some manner to procure an assignment of the securities when obtained from his son, in order to protect the estate from further incumbrances. Whether L. was informed of the precise nature of the dealing before the securities were given, did not conclusively appear. There was no evidence that the goods were charged at exorbitant prices; on the contrary it was proved that they were charged at the prices marked on them by tickets for general customers, and that they were fairly worth the prices so charged. Under these circumstances the bill was dismissed, and the decree affirmed on appeal.

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THE Appellant who was the eldest son and heir apparent of Viscount Lorton in 1829 filed a bill in Chancery stating a case as follows: Under a settlement dated the 17th of July 1827, made by Lord Lorton and the Appellant, for re-settling the family estates, after he attained twenty-one, the Appellant became entitled to an annuity of 800*l.*, during the joint lives of himself and his father, charged upon divers estates in Ireland of great value, and to the

same estates in remainder for his own life, expectant upon his father's death.

In April 1828, the Appellant became greatly embarrassed, and in want of a loan of money, and a negotiation for a loan of 5000*l.* took place between George Samuel Ford of Pall Mall, as solicitor for the Appellant, and Montague Newland, of Craven-street, Strand, attorney and solicitor, who applied to the Respondent on the subject of such loan; and the Respondent having ultimately declined advancing money, but expressed himself willing to let the Appellant have goods out of his shop instead, the treaty proceeded on that footing; and the Respondent authorised Montague Newland to act as his solicitor and on his behalf in negotiating and concluding the matter; and thereupon Mr. Newland applied for the abstract of the Appellant's title, which was procured and sent to him by Mr. Ford, and the sum ultimately arranged to be taken in goods was 8000*l.*

The Appellant being pressed by his necessities sold, and by indenture bearing date the 16th of July 1828, assigned 500*l.* per annum, part of his annuity of 800*l.*; and the fact of such sale was communicated to Mr. Newland, and by him to the Respondent, who nevertheless agreed to proceed in the proposed transaction; and Mr. Newland, on the Respondent's behalf, prepared a draft of the proposed deed of mortgage, reciting that the Appellant was justly indebted to the Respondent in 8000*l.*, and purporting to assign the remaining 300*l.* a year of the said annuity, and to convey the Appellant's life estate in remainder, to the Respondent for securing the principal sum of 8000*l.*, and interest at five per cent.

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In September 1828 the Appellant was obliged by his pressing necessities to dispose of the remaining 800*l.* a year of his annuity ; and Mr. Newland having been informed thereof communicated the fact to the Respondent, who, nevertheless, agreed to proceed in the transaction, and the draft prepared as aforesaid was altered and reduced to a conveyance of the Appellant's life estate.

On the 28th of October 1828 (being then of the age of about twenty-three or twenty-four years), the Appellant and Mr. Ford went to the Respondent's shop in Princes-street Westminster, for the purpose of executing the mortgage and selecting goods to the amount of 8000*l.*

Mr. Newland attended on the occasion, and brought with him the mortgage-deed and other securities, consisting of two warrants of attorney for confessing judgment in England and Ireland for 16,000*l.*, and a promissory note for 8000*l.* ; the Appellant executed and signed the mortgage-deed and other securities ; and certain articles of plate, pearl and diamond necklaces, bracelets, ear-rings, and other personal ornaments, snuff-boxes, gold chains, and other articles of jewellery were on the same occasion selected or set apart out of the Respondent's stock, the shop prices of which amounted to 7713*l.* 6*s.* 6*d.*, and some other articles of silver plate to the amount of 276*l.* 13*s.* 6*d.* were to be made or procured, in order to make up the remainder of the 8000*l.*

The mortgage-deed bore date the 28th of October 1828, and is expressed to be made between the Appellant of the one part, and the Respondent (therein described as of Cavendish-square, in the county of Middlesex, Esquire) of

the other part; and after reciting the indenture of settlement making a present provision of 800*l.* a-year for the Appellant, and giving him a life estate in remainder, in all his family estates in Ireland, and also reciting the two indentures dated respectively the 16th of July, and the 1st of September 1828, by which the Appellant had disposed of his annuity of 800*l.*; and after reciting that the Appellant was justly and truly indebted to the Respondent in the sum of 8000*l.*, and that it had been agreed that that sum and interest should be secured by a conveyance of the Appellant's life estate in remainder, and that two policies of insurance for the sums of 5000*l.* and 3000*l.* respectively should be effected upon the Appellant's surviving his father, but in the name of the Respondent, and that the Appellant should pay the annual premiums and other sums on the policies, which should be a further security for the 8000*l.* and interest; it was witnessed that in pursuance of such agreement, and in consideration that the Appellant then stood well and truly indebted in the sum of 8000*l.* to the Respondent, as the Appellant did thereby acknowledge, and of the sum of 8000*l.* did thereby admit the receipt, and release the Respondent from the same, the Appellant granted and conveyed his said life estate to the Respondent without impeachment of waste, subject to redemption on payment of 8000*l.* on &c., with a declaration that if default should be made in payment of the principal sum of 8000*l.* and interest, or any part of the same respectively, at any one of the times thereinbefore appointed for payment thereof, it should be lawful for the Respondent, his executors, administrators, and as-

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signs, and he and they were thereby empowered of his and their own proper authority, without any further consent or concurrence of the Appellant or any other person, and at any time or times thereafter to make sale and absolutely dispose of the lordships, manors, castles, dissolved abbeys or monasteries, towns, advowsons, tithes, lands, tenements, hereditaments and premises thereby released, or any of them or any part of the same, together or in lots, or at one or several times, by public auction or private contract, or partly by public auction and partly by private contract, and for the best price or prices that could be reasonably obtained, with liberty to buy in at any auction and rescind any contract for sale at any auction or by private contract, and afterwards to sell the premises bought in or comprised in such contract without being answerable for any loss or diminution in price, and with full power to the Respondent to convey to the purchasers free from the said proviso for redemption.

The deed also authorised the Respondent without any further consent or concurrence of the Appellant to grant leases either from year to year, or for any term of years, and either for a premium or otherwise, and afterwards to sell: To receive the rents and profits of the estates until sale made, and out of the monies which should come to his hands to pay himself all expenses attending the execution of the powers thereby given him, and all sums to be paid by him for the premiums on the policies not exceeding 2000*l.* and interest thereon, and then the 8000*l.* and all arrears of interest on it. And the Respondent covenanted not to sell or enter into

possession until after three months' notice in writing, demanding payment from the Appellant.

The usual receipt for 8000*l.* consideration money was indorsed on the deed, and the deed did not notice the promissory note or warrants of attorney, or the judgments intended to be entered up thereon. The promissory note was for 8000*l.* payable on demand, and expressed to be for goods sold and delivered, and judgment was entered up in Ireland on the warrant of attorney executed for that purpose. The goods before mentioned constituted the sole consideration for the mortgage, and other securities, and they were not delivered by the Respondent to or for the use of the Appellant, until about a month after the securities were executed. Mr. Newland required of the Appellant the sum of 400*l.* for his costs and commission in the transaction, as the solicitor of the Respondent; and Mr. Ford on the Appellant's behalf, was obliged to pay Mr. Newland that sum before the Respondent would deliver the goods; but 104*l.* was afterwards recovered back from him. On the 25th of November 1828 the Respondent delivered the goods to Mr. Ford, who shortly after procured an advance of 2500*l.* for the Appellant from Mr. George Robins, of Covent-garden, auctioneer, on a bill of sale of the goods.

The goods were never valued by any jeweller, or any person on behalf of the Appellant; and the Appellant for several months prior to and at the time of the transaction, was living apart from and holding no communication with his father or family, and had no present fortune or income.

The transaction having come to the knowledge of the Appellant's friends, and it being agreed or

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understood that some of them would redeem the goods out of Mr. Robins's hands, provided the Respondent would take them back, and rescind the mortgage transaction; the Appellant, by Messrs. Bridges and Mason his agents and solicitors, in January 1829 applied by letter and notice in writing to the Respondent, and informed him of the goods being in the hands of Mr. Robins for sale, and required him to receive them back and to cancel the mortgage, and other securities; but the Respondent refused to take back the goods, and in consequence thereof the Appellant's friends did not pay Mr. Robins the sum advanced by him thereon, and the Appellant continuing under the pressure of necessity, and being wholly destitute of any present income or property, or any means of redeeming the goods, the same were sold by auction by Mr. Robins, in March 1829, and produced the sum of 348*l.*; and after deducting thereout 10*l.* per cent. for Mr. Robins's commission on the sale, and the sum paid to Mr. Newland, the Appellant received 2730*l.* from such sale.

Previous to the sale, and in the expectation that the Respondent would be induced to take back the goods, and the Appellant's friends to redeem the same for that purpose, the Appellant filed a bill against the Respondent, seeking to rescind the mortgage transaction, and return the goods: but the Respondent having resisted the suit the goods were sold by Mr. Robins pending the suit; and the Appellant was consequently obliged to relinquish further proceedings in that suit, and the same was in July 1829 dismissed at the instance of the Respondent for want of prosecution.

The Appellant remained without any present income or property up to the time of his marriage in December 1829, when a suitable provision was made for him, and he then filed his bill in this cause against the Respondent, on or about the 26th day of July 1830, stating a case to the same effect as in the former bill as hereinbefore set forth, and praying that the Respondent might be ordered to deliver up the mortgage-deed and other securities to be cancelled, and to execute a re-conveyance if necessary, and to enter up satisfaction on the judgment, on being paid the amount derived by the Appellant from the goods, with interest, or on such other terms as the court should think proper. And that the Respondent might be restrained from taking any proceedings against the Appellant or his estate, in respect of the sum of 8000*l.*, or the interest thereof, or any security for the same.

The Respondent filed his answer on the 11th of January 1831, and thereby stated (amongst other things) that he had been informed and believed that the Appellant by his then solicitor Mr. Ford, and also by James Ferrall, Esquire, a gentleman in the confidence of Viscount Lorton, the said James Ferrall acting in such application with the Viscount's privity and approbation, in April 1828 applied to Mr. Newland, when Mr. Ford requested Mr. Newland to ask the Respondent to supply the Appellant with money and shop goods of the Respondent to the total amount of 8000*l.*, upon having the amount thereof with interest secured on the Appellant's annuity or reversionary interest, and by an insurance on the Appellant's life; and that in April or

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May 1828, Mr. Newland made some application to the Respondent under the circumstances aforesaid, and that the Respondent stated that he would not, without Viscount Lorton's knowledge, comply with such application; but that if the said Viscount did not disapprove thereof, and the proposed security should appear satisfactory, he would comply therewith, but did not promise or hold out that he would advance money: that the Respondent was subsequently informed, and therefore believed, that such the Respondent's answers were by Mr. Newland communicated to the said Viscount through his confidential friend Mr. Ferrall, and that Mr. Ferrall thereupon stated to Mr. Newland, and authorised him to inform the Respondent, that Lord Lorton did not disapprove of such proposed transaction, and being so informed by Mr. Newland he the Respondent consented to supply the Appellant with shop goods to the amount of 8000*l.* in price on the proposed terms; and that he thereupon authorised Mr. Newland to act as the Respondent's solicitor in completing such transaction. The Respondent further stated his belief that after he had so authorised Mr. Newland, and while the transaction was in progress, it was discovered by Mr. Newland that the Appellant had otherwise disposed of his annuity of 800*l.*, and had thereby reduced the proposed security to his reversionary life estate and to an insurance on his life; and as the Respondent believed that that was communicated to Lord Lorton while the transaction with the Respondent was in progress; and that Lord Lorton still continued to wish such transaction with the Respondent to proceed and be com-

pleted : that he believed that early in September, 1828, Mr. Sergeant Lefroy, of the Irish bar, and his son Mr. Anthony Lefroy, son-in-law of Lord Lorton, had together, on Lord Lorton's behalf, an interview with Mr. Newland, at which the nature of the transaction and proposed security was fully and accurately communicated and explained by Mr. Newland to them, together with the form of the draft mortgage, and that they expressed themselves perfectly satisfied with such explanation, and their approbation of the proposed transaction ; and that Mr. Sergeant Lefroy stated his intention of recommending Lord Lorton to redeem shortly the security so proposed to be made to the Respondent : that the transaction was in the nature of an actual and *bonâ fide* sale ; and he denied that it was in the nature of a loan, or that the said goods were substituted for money ; and he also denied that at the date and execution of the mortgage he knew, or had any reason to believe, that the Appellant had no use or occasion for the goods or any of them, or that the Appellant did not intend to keep or use the same or any of them, or that the Appellant's object was to raise a sum of money by way of loan from him by means of such goods ; for that at the time when Mr. Ford and the Appellant selected the goods, as Respondent had been informed by his shopman and believed to be true, they selected such as would be useful on the marriage of the Appellant, the said Mr. Ford and the Appellant at the time of such selection frequently mentioning such marriage. He insisted that the Appellant was not entitled to any part of the relief prayed by his bill ; for that if the Appellant could procure the securities to be delivered up on the

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deliver up the securities, which H. refused to do. Thereupon a bill was filed by K., praying that the securities might be delivered up, and offering to return the goods, and in the mean time to deposit them in court. This was not done; but the goods were sold at a public auction, under his power by R., for a sum of £3482, a small part being purchased at the sale by K. The bill was afterwards, in July 1829, dismissed for want of prosecution. In July 1830 another bill was filed, stating the same case as in the former bill, charging among other things that the goods were sold to K. at an exorbitant overcharge, and praying delivery of the securities on payment of the sum for which the goods were sold, with interest, or upon such other terms as the court should think just. The bill also prayed an injunction to restrain negotiation of the promissory note, &c. This injunction was granted by order of the Vice-Chancellor, and upon motion to discharge this order it was upheld by the Lord Chancellor.

By evidence in the cause it appeared that L., to a certain extent, encouraged the transaction between his son and H., having employed agents to bargain with H., or in some manner to procure an assignment of the securities when obtained from his son, in order to protect the estate from further incumbrances. Whether L. was informed of the precise nature of the dealing before the securities were given, did not conclusively appear. There was no evidence that the goods were charged at exorbitant prices; on the contrary it was proved that they were charged at the prices marked on them by tickets for general customers, and that they were fairly worth the prices so charged. Under these circumstances the bill was dismissed, and the decree affirmed on appeal.

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THE Appellant who was the eldest son and heir apparent of Viscount Lorton in 1829 filed a bill in Chancery stating a case as follows: Under a settlement dated the 17th of July 1827, made by Lord Lorton and the Appellant, for re-settling the family estates, after he attained twenty-one, the Appellant became entitled to an annuity of 800*l.*, during the joint lives of himself and his father, charged upon divers estates in Ireland of great value, and to the

same estates in remainder for his own life, expectant upon his father's death.

In April 1828, the Appellant became greatly embarrassed, and in want of a loan of money, and a negotiation for a loan of 5000*l.* took place between George Samuel Ford of Pall Mall, as solicitor for the Appellant, and Montague Newland, of Craven-street, Strand, attorney and solicitor, who applied to the Respondent on the subject of such loan; and the Respondent having ultimately declined advancing money, but expressed himself willing to let the Appellant have goods out of his shop instead, the treaty proceeded on that footing; and the Respondent authorised Montague Newland to act as his solicitor and on his behalf in negotiating and concluding the matter; and thereupon Mr. Newland applied for the abstract of the Appellant's title, which was procured and sent to him by Mr. Ford, and the sum ultimately arranged to be taken in goods was 8000*l.*

The Appellant being pressed by his necessities sold, and by indenture bearing date the 16th of July 1828, assigned 500*l.* per annum, part of his annuity of 800*l.*; and the fact of such sale was communicated to Mr. Newland, and by him to the Respondent, who nevertheless agreed to proceed in the proposed transaction; and Mr. Newland, on the Respondent's behalf, prepared a draft of the proposed deed of mortgage, reciting that the Appellant was justly indebted to the Respondent in 8000*l.*, and purporting to assign the remaining 300*l.* a year of the said annuity, and to convey the Appellant's life estate in remainder, to the Respondent for securing the principal sum of 8000*l.*, and interest at five per cent.

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able for him to accede to the proposal which had been made by Mr. Newland, which was that Lord Lorton might have an assignment made to him of such security as the Appellant should give to the Respondent for the sum of money so to be advanced by the Respondent : that in consequence of such request the deponent called upon Mr. Newland, in company with his son Mr. Anthony Lefroy ; and Mr. Newland on that occasion informed deponent, that Respondent was about to lend Appellant a sum of money (amounting, as deponent best recollected, to 8000*l.*, or thereabouts) upon the security of the Appellant's estates ; and deponent informed Mr. Newland of the reason of deponent's calling upon him, stating that Lord Lorton understood that Respondent would be willing to assign to Lord Lorton any security the Respondent might obtain from the Appellant, so as to enable Lord Lorton to get a control over the property of the Appellant, and prevent him from further involving himself : that Mr. Newland showed deponent a draft of the intended mortgage, and deponent looked over parts of it, but without paying any particular attention to it, and did not read it, it not being important to the object of deponent's interview : and deponent further stated that neither Mr. Newland nor any other person did at that interview or at any other time inform him, or state in his hearing, that the consideration for the intended mortgage or security, or any part of such consideration, was to be formed of goods, and that he did at such interview believe and understand that money, and money only, was to be the consideration for the intended mortgage ; nor did he at any time before the execution of that security know or suspect that the consideration, or

any part of it, was formed of goods; and having some time afterwards heard that Mr. Newland had alleged that he had informed deponent that the consideration for the security was composed of goods, deponent called upon Mr. Newland, and asked him whether he had ever made such an allegation, and Mr. Newland distinctly admitted that he had not so informed deponent, but said that he had mentioned the circumstance to the deponent's son, at which deponent expressed his great surprise, as his son was a young man not at all acquainted with business, and had not taken any share in the conversation on the subject of the interview. (This witness was not cross-examined.)

Mr. Anthony Lefroy deposed, among other things, that he was not and never had been in any profession; and that Mr. Newland did not on the occasion of the said interview, or at any other time, to the best of his deponent's then recollection, inform him or give him any reason to know or suspect that the consideration for any intended mortgage was to be formed wholly or in part of goods. (This witness was not cross-examined.)

Mr. Bridges deposed, among other things, that he believed that if the Respondent had agreed to comply with the Appellant's application (to receive back the goods and deliver up the security), the Appellant would, by the assistance of Lord Lorton, have been in a situation to restore to the Respondent the whole of the said goods. He also stated, that he and his partner, Mr. Mason, were, in the years 1829 and 1830, and still continued to be, employed as solicitors for Lord Lorton and the Appellant; that the application made to the Respondent in January, 1829, was

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made on behalf of the Appellant and Lord Lorton.

In his deposition, on cross-examination, this witness stated that he and his partner were employed as solicitors in prosecuting this suit at the instance of Lord Lorton and the Appellant; that he (witness) certainly considered that if the costs of the suit were not paid by the Appellant, Lord Lorton, having joined in employing the witness and his partner in conducting the suit for the Appellant, would be bound in honour to see that he (witness) and his partner were paid their costs; that the balance due from Mr. Robins the auctioneer, in respect of the net proceeds of the sale of the articles of plate and jewellery in question in the cause, was, in the first instance, received by witness from the said Mr. Robins, and was, to the best of his (witness's) recollection (speaking from memory, and without having reference to his books), placed to the credit of the said Lord Lorton in his account with this deponent and his said partner; the whole, however, of the said balance so received from the said Mr. Robins, together with a larger sum, was forthwith expended by witness and his said partner in the discharge of private debts contracted by the Appellant, and for which the said Lord Lorton was in no way liable or responsible; so that, in effect, no part of the proceeds of the said sale was paid to the said Lord Lorton, or on his account; that, by the desire of the said Lord Lorton, witness had a communication with the said Mr. Robins previous to the said sale, for the purpose of inducing the said Mr. Robins to postpone the said sale (which had been then advertised), with the hope that an arrangement might be effected with the Defendant

for receiving back the said articles of plate and jewellery.

Lord Lorton, the next witness on behalf of the Appellant, after stating in his deposition that the Appellant was his eldest son and heir apparent, and was born (as his Lordship best recollected) in the month of June 1804 or 1805; and also stating that the Appellant, after disposing of his annuity of 800*l.* a-year, had no income or property in possession for his support; said, that he did not know where the Appellant resided in the months of April, May, June, July, August, September, and October, 1828, respectively, but understood that he was then residing in or about London; and that he (Lord Lorton) did not see the Appellant oftener than twice during that period, at which times he saw him at his (Lord Lorton's) house at Richmond, in the county of Surrey, and he remained there only a few hours. Lord Lorton then states, "that he "knows Mr. James Ferrall, and has known him "from the spring of the year 1828, as he best "recollects as to the time when he first saw the "said James Ferrall; and that he became acquainted with the said James Ferrall in consequence of the said James Ferrall having, in or "about the spring of 1828, introduced himself to "witness by a letter to witness's brother General "King, stating that he the said James Ferrall had "heard that a son of witness's was then in the "hands of sharpers, and as his (said James Ferrall's) "family was under great obligations to the Earl of "Rosse, he (said James Ferrall) could not bear to "see the grandson of said Earl of Rosse going on "under such circumstances without offering his "services to rescue him; and in consequence of

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“ the said letter witness had an interview with the  
“ said James Ferrall at the house of said General  
“ King, in Portland Place, in the county of Mid-  
“ dlesex, and previous to which witness had not  
“ any knowledge of, or correspondence with, the  
“ said James Ferrall; and witness had subsequent  
“ interviews with the said James Ferrall at the said  
“ house of said General King; and on some of  
“ those occasions he the said James Ferrall informed  
“ witness that the Appellant was endeavouring to  
“ raise money upon post-obits in various ways, and  
“ particularly a large sum from the Respondent  
“ (whom witness had never seen, to the best of his  
“ knowledge); and the said James Ferrall men-  
“ tioned the name of a person as treating with the  
“ Appellant on the behalf of the Respondent in  
“ respect of such loan, such person being (as wit-  
“ ness best recollects and believes) Mr. Montagu  
“ Newland, of Craven Street, in the Strand, the  
“ solicitor of the Respondent; and the said James  
“ Ferrall did make some suggestion (the particulars  
“ of which deponent does not now recollect) rela-  
“ tive to the said person.

“ That sometime in or about May, 1828, witness  
“ had an interview with the said Mr. Newland  
“ at the United Service Club, then in Waterloo  
“ Place, in the said county of Middlesex, and  
“ which interview lasted but a few minutes; and  
“ on which occasion the said Mr. Newland made  
“ some proposition to witness, but the particulars  
“ of which witness does not recollect; and he  
“ (witness), being desirous to waive the business  
“ altogether, did not then, or at any time, come  
“ to any arrangement with any person on the sub-  
“ ject of such proposition.

“ That he (witness) does know Thomas Lefroy  
 “ of the city of Dublin, Esq. ; that he (witness)  
 “ being unacquainted with matters of law himself,  
 “ and the said Thomas Lefroy being about to pass  
 “ through London to make a tour on the Conti-  
 “ nent, witness did sometime in or about the end  
 “ of the summer of the year 1828, request said  
 “ Thomas Lefroy to see Mr. Newland and the  
 “ said James Ferrall (as witness best recollects as  
 “ to said James Ferrall) relative to some proposi-  
 “ tion made or about to be made on the part of  
 “ the Respondent respecting some loan transaction,  
 “ in which the Appellant was (as witness under-  
 “ stood) concerned ; and witness so requested the  
 “ said Thomas Lefroy to see the said persons, or  
 “ the said Mr. Newland, for the purpose or with  
 “ the view to prevent witness getting into difficulty  
 “ in regard to the said transaction, as witness had  
 “ reason to believe that the said persons were en-  
 “ deavouring to get witness to enter into a counter  
 “ security to said Respondent.

“ That he (witness) was afterwards given to  
 “ understand by said Mr. Lefroy himself (as wit-  
 “ ness also best recollects), that he said Mr.  
 “ Lefroy did see the said Mr. Newland respecting  
 “ said matter, but what occurred at such interview  
 “ witness does not know, not having been present  
 “ thereat ; and says that at the time when witness  
 “ requested said Mr. Lefroy to see the said Mr.  
 “ Newland as aforesaid, witness did believe, from  
 “ what passed with the said Mr. Newland at the  
 “ aforesaid interview at the United Service Club,  
 “ that the Respondent was acting (*bonâ fide*)  
 “ through the instrumentality of said Mr. Newland,  
 “ with regard to the sum of 8000*l.*, which witness

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“was given to understand had been made by the  
 “Respondent to the Appellant, and respecting a  
 “mortgage to be given by the Appellant of the  
 “his reversionary estate and interest in the afore-  
 “said lands, tenements, and hereditaments; but  
 “witness does not now recollect whether he did  
 “or not believe, or form any belief, that the Re-  
 “spondent would, in case of his completing the  
 “said loan transaction, make any assignment to  
 “witness, or whether he (witness) did in any  
 “manner interfere in or in relation to such matter.  
 “That neither the said Mr. Newland, or the said  
 “Anthony Lefroy, or the said Thomas Lefroy, or  
 “the said James Ferrall, or any other person, did  
 “at any time prior to the date and execution of  
 “the mortgage, which witness has been given to  
 “understand was given by the Appellant to the  
 “Respondent for securing to the Respondent the  
 “payment of the sum of 8000*L*., in any manner  
 “inform witness, nor did witness, at any time prior  
 “to the date and execution of such mortgage, in  
 “any manner learn, or from any reason entertain  
 “any suspicion, that any goods or articles formed  
 “either wholly or in any part the consideration for  
 “said mortgage; and witness did not (as he best  
 “recollects) know or hear anything respecting said  
 “mortgage, or the existence thereof, until after  
 “the same had been (as he was given to under-  
 “stand) made and executed; and witness does not  
 “know, except from information, what did in point  
 “of fact form the consideration for said mortgage,  
 “and from what he has heard he believes that such  
 “consideration was wholly formed of articles of  
 “jewellery.”

In his depositions, on cross-examination, Lord

Lorton states, "that the solicitors who are employed by the Appellant in this suit are witness's solicitors, and were recommended by witness to the Appellant, and witness is in occasional communication with them on the subject of this suit ; but they were engaged and employed by the Appellant himself to act for him in this suit, and they act, in the conduct of it, principally under his the Appellant's directions."

Mr. Ford deposed (among other things) that the Appellant was in great pecuniary embarrassment in the months of March and April, 1828, and was desirous of raising a loan ; and he then spoke to the treaty between him, on the Appellant's behalf, and Mr. Newland, the Respondent's solicitor, on the subject of the required loan, which ended in the execution of the mortgage and other securities in question, and also to the selection of the goods which formed the consideration for such mortgage and other securities. And he in particular deposed that he assisted on behalf of the Appellant in selecting the said goods, and that he intended to take the consideration or sum of 8000*l.* in silver plate, but the Respondent objected to supply the whole money in such plate, and required that the said amount should be taken out of his general stock ; and thereupon a quantity of pearls, diamonds, watches, and other jewellery, were shown to the Appellant and witness by the Respondent's shopman, and in Respondent's presence ; and witness proceeded and intended to take some of the largest and best diamonds, and Respondent's said shopman said that a certain proportion of pearls ought to be taken, and did then show witness and Appellant a pearl necklace and other articles of pearl.

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Mr. George Robins, the auctioneer, the last of the Appellant's witnesses, spoke to the deposit of the articles with him, as a security of 2500*l.*, and the sale by him, and deposed that part of the articles were, at the sale by auction, purchased for the Appellant; and that the articles in question were in the same plight and condition, at the time of the sale, as when they came into his hands, "except that they were not so clean at the time of the sale."

The first witness examined on the part of the Respondent was Mr. Newland, who stated very fully the first applications to him by Mr. Burt, Mr. Ferrall, and Mr. Ford, on the part of the Appellant, and his (Mr. Newland's) communication with Lord Lorton, through Mr. Ferrall, and his interview with Lord Lorton at the United Service Club, relative to Lord Lorton himself obtaining an assignment of the Appellant's reversionary interest. He then stated, with reference to the purchase of the articles by the Appellant from the Respondent, "that he (witness), by the direction and on the part of the Respondent, applied to the said Mr. Ferrall, "to know whether the said Lord Lorton was aware of and concurred in the said transaction; and "that the said Mr. Ferrall, in repeated interviews "which witness had with him in the course of the "said negotiation, declared most distinctly, that the "said Lord Lorton was aware of the nature of the "said transaction between the Appellant and Respondent, and that the Appellant was to have "goods, and not money, from the Respondent as "the consideration for the said proposed mortgage; "and that the said Lord Lorton concurred in the "said transaction, though witness understood from

“the said Mr. Ferrall that Lord Lorton could not make himself an avowed party to it, on account of the dealing.

“That he (witness) considered and believed at the time, and still believes, that the said Mr. Ferrall was at the period of the said negotiation acting as an agent for Lord Lorton, and was in communication with Lord Lorton upon the affairs of the Appellant, and was authorized to state the said Lord Lorton’s concurrence in the said transaction between the Appellant and Respondent; and that the said Mr. Ferrall showed witness letters that he had received from Lord Lorton relating to the affairs of the Appellant, and it was from one of these letters that witness first learnt that the Appellant had sold a portion of his said annuity; that these letters were couched in a familiar style, commencing ‘Dear Sir,’ and ending with ‘Yours truly,’ or ‘Yours sincerely,’ and gave witness reason to suppose there was an acquaintance of some intimacy between the said Mr. Ferrall and Lord Lorton.”

Mr. Newland then states, “that Mr. Ferrall was present at his (Mr. Newland’s) interview with Lord Lorton at the United Service Club House, on the 11th day of June, 1828, by the desire of Lord Lorton; and that upon the occasion of that interview, Lord Lorton addressed the said Mr. Ferrall familiarly, and, to the best of deponent’s recollection, called him by his surname ‘Ferrall’ only; and that said Lord Lorton and Mr. Ferrall appeared to be on intimate terms.” Mr. Newland then states, “that on the 3d day of September, 1828, witness received a letter from Mr. Anthony Lefroy, requesting to see witness upon particular

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“business; and on the 5th of that month the said  
“Anthony Lefroy and his father Mr. Sergeant  
“Lefroy called upon witness; and that upon that  
“occasion, after some conversation had passed  
“respecting the affairs of the Appellant, witness  
“handed the draft deed (produced and proved by  
“the witness as an exhibit) to the said Sergeant  
“Lefroy for his perusal, and whilst he the said  
“Sergeant Lefroy was engaged in perusing the said  
“draft, witness and the said Anthony Lefroy  
“entered into conversation respecting the transac-  
“tion between the Appellant and Respondent, in  
“course of which witness perfectly remembers, and  
“can positively state, that he mentioned to the  
“said Mr. Anthony Lefroy that the said transac-  
“tion was entirely for goods; and witness at the  
“same time pointed out to the said Anthony Lefroy  
“how much better it would be for Lord Lorton to  
“advance his son, the Appellant, the money, and  
“take the mortgage himself, as, if the Appellant  
“were to sell the goods purchased of the Defend-  
“ant, there must be a considerable loss sustained  
“by him; upon which the said Anthony Lefroy  
“replied, ‘Oh, never mind the sacrifice, so that  
“the estate is saved,’ or the said Anthony Lefroy  
“used expressions to that effect; that he (witness)  
“has no doubt, from what passed between witness  
“and the said Anthony Lefroy at this interview,  
“but that he the said Anthony Lefroy distinctly  
“understood the real nature of the transaction  
“between the Appellant and Respondent, and that  
“the Appellant was to have goods, and not money,  
“from the Respondent on the security of his said  
“reversionary estate; that the said Mr. Sergeant  
“Lefroy was in the same room with and very near

“to witness and the said Mr. Anthony Lefroy, whilst the said conversation was going on between them, witness, and the said Mr. Anthony Lefroy, respecting the transaction between the Appellant and Respondent; and though the said Mr. Sergeant Lefroy was engaged in perusing the said draft, yet, as the conversation passed in an ordinary tone of voice, and witness’s room, where the said interview took place, is a very small one, witness thinks it scarcely possible but that the said Mr. Sergeant Lefroy must have heard what was said by witness and the said Anthony Lefroy.”

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The draft of the mortgage, which was looked over by Mr. Sergeant Lefroy during this interview, contains a recital as to the consideration for the deed; not that the Respondent had advanced and lent to the Appellant any sum of money, but that the Appellant “is justly and truly indebted” to the Respondent in the sum of 8000*l*.

The instructions to the conveyancer who prepared the draft were also proved as an exhibit, and stated that the consideration for the deed was goods to be sold by the Respondent to the Appellant, in the course of his trade, to the amount of 8000*l*.

The counsel for the Appellant, at the hearing of the cause, required the production of the promissory note taken by the Respondent from the Appellant at the same time with the mortgage. That note, on being produced, was found to be in the following terms:—

“£ 8000.

“London, 24th Oct. 1828.

“I promise to pay the sum of eight thousand pounds to Mr. Thomas Hamlet or order on



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“demand, for value received as per bill of this  
“date for goods sold. “R. KING.”

Six other witnesses were examined on the part of the Respondent, to prove that the goods were purchased in the Respondent's shop at the marked shop prices, and were freely selected by the Appellant, and that the articles were of the full value of 8000*l*. Three of these witnesses, persons unconnected with the Respondent, but skilled in the value of such articles, deposed that they had examined and valued them while in the hands of Mr. Robins's bankers, and that they were of the full value of the prices charged by Mr. Hamlet.

The catalogue of the sale by auction was also given in evidence, and showed that the articles in question formed at the sale 74 lots out of 584 lots of similar articles then put up for sale by public auction by Mr. Robins.

On the hearing of the cause the Appellant relied upon the cases of *Barker v. Vansommer*, in Mr. Brown's Chancery Reports, and *Waller v. Dart*, in Equity Cases Abridged, and the known and admitted principle of equity, as authorities in support of the relief sought by his bill. And the Respondent, on the other hand, insisted upon the dealing between Appellant and Respondent being a mere *bonâ fide* sale of goods in the course of Respondent's trade. And the Respondent also insisted that Lord Lorton must be taken to have been informed of the real nature of the transaction by Mr. Ferrall and by Mr. Newland, through Mr. Anthony Lefroy (who in his evidence said he accompanied his father to Mr. Newland's at the request and on the behalf of Lord Lorton), and

that the father's privity took the case out of the principle on which relief is given in similar cases. And further, that the pressure of the Appellant's necessities must be considered to have ceased from the time when his friends were prepared to have redeemed the goods from Mr. Robins, and that he was therefore bound to have kept the goods to await the hearing and result of his first suit.

The Lord Chancellor, after the evidence had been read, and the case argued, having taken time to consider his judgment, on the 21st of January, 1834, ordered and decreed "that the Plaintiff's bill do stand dismissed out of court, without costs, and that the injunction granted should be dissolved."

Against this decree the appeal was brought.

For the Appellant Sir *W. Horne*, Mr. *Pemberton*, (and Mr. *B. Parry*.)

It was proved on the part of the Appellant that the transaction proceeded from a negotiation with the Respondent for a loan of money; it is not the case of a sale of goods in the course of the Respondent's trade, but an advancement of goods instead of money to supply the Appellant's necessities; and under the mask of trading, a method of lending money at an extraordinary rate of interest, the Respondent taking advantage of the Appellant's necessities. The very nature of the goods must have satisfied the Respondent that the Appellant's object was not to obtain goods, but an advance of money. They comprised many articles of the same class; for example, three diamond necklaces, a diamond and ruby necklace, and a pearl necklace, and the price of the latter alone exceeded 1500*l*. Did the Respondent, an intel-

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ligent tradesman and man of the world, suppose that the Appellant mortgaged his reversion with a power of sale, insured his life at a considerable cost, and gave warrants of attorney for both England and Ireland, so that neither he nor his property could have any escape, at a time that he was separated from his family, and had to the knowledge of the Respondent disposed of his only present resource, the annuity provided for him out of the family estates on the resettlement of them — did he suppose that the Appellant entered into such liabilities and paid an attorney's bill to the amount of 400*l.* in order to play with such toys as diamond, ruby, and pearl necklaces? The Respondent well knew that the Appellant obtained them only for the purpose of supplying his urgent occasions for money. The extent, as well as the nature of the purchase, proved it. In this alleged purchase of such costly articles of taste, the Appellant's attorney selected most of the articles, and according to his evidence, wished to avoid jewellery, and to obtain plate as a more ready money article; but this the Respondent's shopman would not permit.

The goods were detained for a month till the deeds were registered, and the attorney's bill paid — a singular mode of treating a customer for 8000*l.* worth of jewellery, &c. with ready money, for the securities carried interest immediately; therefore as against the Appellant it was a ready money transaction. The conclusion may be readily anticipated. These diamond necklaces and other articles of taste were sent by the Respondent to the office of the Appellant's attorney; from his office they quickly found their way to the

auctioneer's warehouse, and having been, as the phrase is, submitted to public auction, they were sold at excellent prices ; but the result to the Appellant was so ruinous that it would have been acting mercifully towards him if the Respondent had at once deducted 60 per cent. from the 8000*l.* proposed to be advanced and taken a security for the 8000*l.* at five per cent. interest. Such plain, straight-forward dealing, would have saved the Appellant from much vexation, and have put him in possession of some additional hundreds of pounds. Unless, as Lord Chancellor King observed on another occasion, we blow up as with gunpowder this branch of equitable jurisdiction, this transaction cannot stand. Where, as in a case like this, a shopkeeper knows that the sale of his goods in his shop is nominal, and that they must be really sold in a very different market, equity relieves against a pretended sale in the shop, and treats it as a loan having an usurious tendency, and as a catching bargain, and allows him only the sum realised by the sale in that market, to which he knew they were destined.

The Appellant was an expectant heir. It is not denied that an expectant heir may mortgage his expectancies for a *bond fide* advance of money ; but he cannot borrow money in the shape of goods, and then mortgage his expectant property to secure the amount of the bill. A sale by him out and out of his reversion at an undervalue cannot be maintained ; a mortgage is a partial sale, and may operate as a total alienation, and therefore is governed by the same rule. This was simply an attempt to evade the rule and to secure to the Respondent some 25 or 30 per cent. principal, beyond

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what he actually parted with. The transaction was not such as induced the Respondent to consult his own regular professional advisers, but he put the matter into the hands of a Mr. Newland, who exacted 400*l.* for his costs, of which he was afterwards compelled by law to refund 104*l.* The Respondent was throughout aware that the Appellant was a young man unmarried, and not a housekeeper; and that he was not living under the control of his father. While this very transaction was in progress, the Appellant was compelled by necessity, as the Respondent knew, to sell the whole of the provision made for him only shortly before, on his coming of age, and joining in resettling the family property, and he was therefore wholly destitute of any present means of subsistence. The transaction commenced in an application for a loan of only 5000*l.* lent money, and it was increased to 8000*l.*, because the proposed loan having changed its character, it was necessary to enlarge the amount to 8000*l.*, in the delusive hope that it would realise 5000*l.*; but to the Appellant the produce was only 2730*l.* The Respondent did not even make his customary rebate of 5*l.* per cent. for ready money, which in this case would have amounted to 400*l.*, although the mortgage carried interest at 5*l.* per cent. from its date.

The real nature of the transaction could not be stated with safety. In the mortgage, therefore, the Respondent describes himself not as a goldsmith in Sidney's Alley, but as an esquire, in Cavendish Square. It states, not a dealing for goods, but a debt from the Appellant to the Respondent of 8000*l.*, and the Appellant is made

in the body of the deed to admit the receipt of the 8000*l.*, and a receipt is endorsed on the deed, and signed by the Appellant, which, contrary to the truth of the transaction, represents the money, the 8000*l.*, as then paid down. Advantage was taken of the Appellant's necessities, not only by the substitution of jewellery for money, and by the retention of goods, until Mr. Newland's demand of 400*l.* was satisfied, but also by the oppressive nature of the securities. Powers of sale of the Appellant's reversion in the family estates in case of default in payment of even any half year's interest — policies of insurance for 8000*l.*, — warrants of attorney for entering up judgments against him in England and Ireland — a judgment in Ireland — a promissory note for 8000*l.* payable on demand, although by the deed three years' credit was given — all attest the griping nature of the transaction, and the absolute dominion which the Appellant's necessities had given the Respondent over him. Is then this a case, in which a court of equity cannot or ought not to relieve? *Barker v. Vansommer* \* : The Duke of Ancaster's case.

Even assuming, contrary to the fact, that the Appellant's father was informed by the Respondent or his agents of the real nature of the transaction, it would not afford a sufficient reason for withholding all relief from the Appellant. The father's knowledge cannot destroy the son's equity. Where the transaction is behind the father's back, it is in general a circumstance against the lender, and forms an additional reason for the case being struck at by public policy ; but it was never de-

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\* 1 B. C. C. 149.

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nied that the equity is that of the heir. Even assuming that Lord Lorton's object was to obtain a power over the Appellant's expectant estate, and that with such view he encouraged the Respondent to furnish the Appellant with goods to the amount of 8000*l.* on security of that expectant estate, in order that he (Lord Lorton) might afterwards get an assignment of the mortgage, the Appellant had no knowledge of his father's views or interference, and such interference cannot defeat his own equity to be relieved from the imposition practised upon him. In truth Lord Lorton, as the evidence proves, never did know that it was intended to advance goods and not money to his son; and when the real transaction was disclosed to him he refused any assistance to his son except upon the condition that the Respondent would take back the goods, which he refused to do. And now the Respondent's equity is made to rest upon the communications with the father. Such a defence only the more strongly marks the nature of the case against the Appellant.

The subsequent sale of the goods by the Appellant, though it might modify, is not sufficient to deprive the Appellant of the relief which equity affords to expectant heirs against oppressive bargains. The sale did not put it out of the power of the Court to administer a specific measure of relief, since the cost price and the sale price (which includes the manufacturer's and shop profit of the goods), and also the value upon a sale by public auction, and the expenses attending such a sale, all distinctly appeared in evidence. The Respondent himself occasioned the sale, by his refusal to take back the goods and rescind the transaction.

There are no circumstances in this case to justify the conclusion that the pressure of the Appellant's necessities ceased from the time he offered to return the goods to the Respondent. On the contrary, it was proved that the Appellant continued wholly destitute of any present property or income until December 1829; and it also appeared in evidence that the offer of assistance from the Appellant's friends to redeem the goods from Mr. Robins was conditional, and depended on the Respondent's agreeing to receive back the goods. This he refused to do, and the Appellant was left to his fate. And if his father's qualified offer, which was not accepted, is to deprive him of his equitable title to relief, it will in future deter parents from offering in such cases a reasonable assistance to their sons; since, if it should prove ineffectual, it would be made the ground of upholding the very transaction which it was their object to avoid. Such a doctrine, is against principle, and altogether unsanctioned by legal authority.

For the Respondent, Mr. *Knight* and Mr. *Stuart*.

Lord Lorton was fully aware of the transaction, or at least had notice enough to prompt inquiry. It must, therefore, be assumed, that he knew his son was raising money upon his reversion. He might have redeemed, or enabled his son to redeem the goods, but they preferred that Mr. Hamlet should be the lender. The produce of the sale was paid to Bridges and Mason, and carried to Lord Lorton's account at first, although the Respondent had the benefit of it afterwards. To one of the parties who went to the Respondent's solicitor on behalf of

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Lord Lorton, it was mentioned that the transaction was to be in goods — is it probable that this was not communicated? This is not, like the cases cited, a sale of a reversion or *post obit* transaction: it is a sale of goods at money price, or at most a borrowing of money at interest, for which a reversionary security is given. The doctrine as to expectant heirs, that where a reversion is bought otherwise than by auction, the purchaser must shew that the full value is given, has been carried to an unreasonable extent, prejudicial to the parties for whose benefit it was supposed to be made, and has been much regretted. It was a rule borrowed from the Roman law, or a supposed necessity for protecting young heirs; where advantage was taken of the distress or inexperience of the party, the bargain was annulled, especially where the father is uninformed of the transaction. Such are the doctrines alluded to in *Cole v. Gibson*\*, *Twisleton v. Griffith*†, *Chesterfield v. Jansen*‡; but these doctrines have no application to the present case. The father had knowledge, or might have known from his agents. Nor is it within the principle of *Barker v. Vansommer*: the transaction in that case was considered and treated as a disguise for usury. In this case the Appellant and his father suffered the goods to be sold at a loss, and are not now in a condition to ask for relief. None has ever been given, but in *Barker v. Vansommer*, except on the principle of restoration, and that was a case of fraud and usury.

*Gowland v. De Faria* § was cited as to costs.

In the course of the argument, the following observations were made:—

\* 3 P. W. 293.; 1 Ves. 503.  
1 Atk. 352.; 2 Ves. 125.

† 1 P. W. 310.  
§ 17 Ves. 20.

*Lord Lyndhurst.*—The depositions of Anthony Lefroy are loose and inaccurate in every part. For instance, he says that he did not “before or after the month of December,” &c., which leaves December untouched. In all the cases, the value of the advance is returned. In *Barker v. Vansommer*, it appeared that the goods were exorbitantly overvalued. Lord Thurlow in that case speaks of usury; but it is necessary to look to the facts, in order to estimate the value of the expression. Here the father knew that the son was negotiating a loan, and proposing security upon his reversion. They had possession of the goods at the time of filing the original bill, and sold them afterwards, having the power to redeem them. Suppose King had been in possession of the goods, would he have been justified in selling them after Hamlet had refused to take them back? What difference does it make, that they were pledged to Robins? The father and son had the power to redeem them.

*Lord Brougham.*—*Davis v. Duke of Marlborough*\*, comes near to this case. *E. Portmore v. Taylor*† is distinct. Here the price of the goods being fair, it would not be a case of usury. The Appellant in his argument, treats it sometimes as a dealing for a reversion, sometimes as a shift for usury. If a tradesman knows that a customer is a pauper, and sells him goods at a fair price, taking a security, can such a transaction be void? The father knew or might have known by inquiry that the dealing was for goods. As to this fact, you cannot put the absence of recollection of one witness against the positive oath of another. Part of the price of the goods was carried to the account

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\* 2 Swan. 139.

† 4 Sim. 182.

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of Lord Lorton : was not this an affirmance of the contract? The case ought to be well considered, if it touches upon former decisions ; but the general principle is not simply involved. It is a case of special circumstances.

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On the 5th of September, the decree was affirmed, Lord Lyndhurst observing that he had heard and considered the arguments, and carefully and deliberately afterwards read over the papers, and the elaborate judgment of Lord Brougham pronounced in the Court below\*, and that he saw no ground to dissent from that judgment, and that the costs ought to follow from the nature of the case.

Lord Brougham said that costs usually are given where fraud is imputed, but as the litigation had been to a certain degree, encouraged by the opinions expressed upon the application for, and the granting of the injunction, and no costs were given in the Court below, the decree ought to be affirmed without costs.

Decree affirmed without costs.

\* 2 Myl. & K. 456.

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## IRELAND.

(COURT OF CHANCERY.)

The Reverend JOHN BOUVERIE and  
Sir THOMAS STAPLES, Baronet - } *Appellants;*

The Right Honourable HECTOR  
JOHN GRAHAM, Earl of NORBURY,  
the Hon. F. PONSONBY, JOHN  
Lord PONSONBY, and FANNY his  
wife. GEO. COCKBURN, CHARLES  
Duke of DORSET, CORNELIUS  
Viscount LISMORE, GEORGE Earl  
of JERSEY, the Right Hon. W.  
RUSSEL, commonly called Lord  
WILLIAM RUSSEL, CHARLES Earl  
GREY, and MARY ELIZABETH his  
wife, HENRY HAMILTON, ARTHUR  
DAWSON, GEORGIANA Lady PON-  
SONBY, and WILLIAM PONSONBY,  
RICHARD Lord Bishop of DERRY,  
and FRANCES his wife, the Hon.  
GEO. PONSONBY, WILLIAM B.  
PONSONBY, HARRIET C. PONSON-  
BY, and LOUSIA PONSONBY - - } *Respondents.*

P. by will devised his estate of B. to his eldest son I., charged with 20,000*l.*, and interest from the day of his death as a legacy, which he bequeathed to G. a younger son. His lands in C. he devised to I. subject to the incumbrances then a charge thereon, and to the payment of all such debts as he might owe at his decease, and also to pay G. 1000*l.* yearly during the life of his wife. He directed that his house at H. should be sold, and the produce applied towards the discharge of his said debts; and as to all the residue of his fortune, both real and personal, he devised and bequeathed the same

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in trust to be sold, and applied to the discharge of his debts, in aid of his said real estates, and he gave to his son F. 10,000*l.* charged on his lands in C.

In these lands in C. the testator had only a life estate, the remainder in fee being in I. his eldest son. In 1815, F. filed a bill in Chancery to put I. to his election. I., by his answer, elected to take under the will; it was declared that the legacy of 10,000*l.* was well charged on the lands in C. and accounts were directed of what was due for the legacy and incumbrances affecting the lands in C. prior to the legacy, and generally of the debts and legacies of the testator affecting those lands and their priorities, &c., and of the personal estate, &c. The Master accordingly found and set forth in schedules to his report, the legacies and debts affecting the lands and their priorities, and the judgment-bond and simple contract debts, owing by the testator at his death, and what was due upon the legacy; but that no evidence as to his personal estate had been laid before him. Upon further directions, it was ordered that in default of payment the lands should be sold, and out of the produce that the judgment and other debts should be paid, and that the plaintiff should be paid what was due upon his legacy, &c.

In this stage of the proceedings, it was discovered that I. had incumbered the lands before the filing of the bill, and could make no valid election, whereupon a supplemental bill was filed, praying that if the creditors of I. would not release their demands, and by reason of the incumbrances the lands in C. could not be sold, then that the lands at B., and the reversion thereof devised to I. should be sold to satisfy the legacy. By the decree in this suit, it was ordered that other lands, the fee-simple estate of the testator, should be sold for the purposes expressed in the former decree, and if they should be insufficient to satisfy the debts and legacies, I. having defeated the will of his father, and disabled himself from making a valid election between the lands in C. and the reversion of the estate at B. that the debts and legacies, &c. should be charges on the reversion of I. in the estate at B., and that the same should be raised by sale thereof, and a reference was made to the Master to ascertain debts and incumbrances, and the priorities thereof, and particularly the legacy of 20,000*l.* to G., and the priority thereof, and out of what fund it ought to be paid.

The Master, by his report, certified that the legacy of 20,000*l.* was payable out of the lands at B., and was next in priority

after the judgment debts remaining unpaid by sale of the other fee-simple estates of the testator. Objections to this report, and afterwards (according to the practice in Ireland,) a motion was made to set aside the report, or that it might be sent back to be varied and amended: but the motion was refused, and that decision was affirmed upon appeal.

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BY indentures of lease and release, bearing date respectively 1st and 2d of September, 1743, Brabazon Earl of Besborough conveyed the barony and manor of Inchiquin, containing several denominations of land in the deed particularly mentioned, situate in the county of Cork, and amongst others, the towns and lands of Aghavine, Bryades, Ballymorrisheen, Cooleloughfinny, Cornweagh, Gortcorkeran, and Garranjames, part of the said barony or manor of Inchiquin, to the use of his second son John Ponsonby for life, and after his decease (subject to the jointure of 1,200*l.* thereby provided for his wife Lady Elizabeth Cavendish) to the use of the first and other sons of the said John Ponsonby, by the said Lady Elizabeth Cavendish, severally and successively in tail male.

There was issue of the marriage William Brabazon Ponsonby the eldest son, (afterwards the Right Honourable William Brabazon Lord Ponsonby) and several other children. William Brabazon Ponsonby attained his age of twenty-one years in 1765, and by an indenture, bearing date the 6th of November, 1769, John Ponsonby and William Brabazon Ponsonby made a tenant to the precipe for suffering a recovery, and in Michaelmas term, 1769, a recovery was suffered, pursuant to such indenture, of the said barony, manor and lands in

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the county of Cork, (excepting and reserving thereout the towns and lands of Aghavine, Bryades, Ballymorrisheen, Cooleloughfinny, Cornweagh, Gortcorkeran, and Garranjames,) which recovery, was by the indenture of 6th November, 1769, declared to enure, to such uses as should be declared by any deed to be thereafter executed by the said John Ponsonby and William Brabazon Ponsonby jointly.

William Brabazon Ponsonby, shortly after the suffering of the said recovery married the Honourable Louisa Molesworth, and by indentures of lease and release, dated the 5th and 6th of December, 1769, (being the settlement made on such marriage) John Ponsonby and William Brabazon Ponsonby, conveyed the manor and lands of Inchiquin in the county of Cork (except the several town lands before mentioned to have been excepted in said indenture of the 6th of November, 1769,) subject to the jointure thereby provided for Louisa Molesworth, and a term for securing it, to the use of John Ponsonby for his life, with remainder to William Brabazon Ponsonby for his life, with remainder (subject to an increased jointure to Louisa Molesworth, and to a term of 500 years) to the use of the first and other sons of William Brabazon Ponsonby, by Louisa his intended wife, severally and successively in tail male with various remainders over, and with the ultimate remainder or reversion to John Ponsonby; the indenture contained a clause authorising John Ponsonby to appoint an annuity not exceeding 300*l.* to his second son George Ponsonby for his life, charged upon all or any part of the manors, lands, and premises thereby granted and released;

the trusts of the term of 500 years were declared to be, for raising and securing the additional annuity for Louisa Molesworth, and the annuity to be appointed to George Ponsonby, and subject thereto, for raising 8,000*l.* as portions for younger children, in such shares and proportions, and in such events, as William Brabazon Ponsonby should by any deed, to be by him duly executed, or by his last will and testament duly executed and attested, direct or appoint: and by the same indenture it was declared that the recovery suffered by John and William Brabazon Ponsonby, in Michaelmas term, 1769, should enure, to the uses declared by the deed of settlement of the 6th of December, 1769.

There was issue of the last mentioned marriage John Brabazon Ponsonby the eldest son, (the Respondent Lord Ponsonby) and several other children.

In Trinity term, 1777, John Ponsonby the elder and William Brabazon Ponsonby suffered a recovery of the towns and lands of Aghavine, Bryades, Ballymorrisheen, Cooleloughfinny, Gortcorkeran, and Garryjames, (being the seven town lands excepted from the recovery and settlement of 1769) and by the deed to lead the uses of such recovery, being an indenture of release of the 24th of May, 1777, it was declared, that such recovery, when suffered, should enure, to and for such uses and estates as should be declared by any deed, to be executed jointly by John Ponsonby and William Brabazon Ponsonby under their hands and seals: and by an indenture of release bearing date 16th June, 1777, executed by John Ponsonby and William Brabazon Ponsonby, they conveyed the

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last mentioned seven town lands to William Burton and Sackville Hamilton (parties thereto,) to and upon certain uses and trusts therein mentioned, with a power to John Ponsonby and William Brabazon Ponsonby, or the survivor of them, to revoke such uses and trusts and appoint others: which power was exercised by William Brabazon Ponsonby, after his father's death, by a deed poll, dated the 20th of June, 1788, whereby he appointed the last mentioned seven town lands to himself in fee.

John Ponsonby the elder, by his will bearing date the 5th of July, 1781, (in pursuance of the power reserved to him by the settlement of the 6th of October, 1769,) charged the settled estates with an annuity of 300*l.* yearly to be raised and paid thereout to his second son George Ponsonby for his life; and shortly afterwards died, without having altered or revoked his will.

By indentures of lease and release, bearing date the 19th and 20th of January, 1803, (being the settlement made on the marriage of John Brabazon Ponsonby with Lady Fanny Villiers) William Brabazon Ponsonby and John Brabazon Ponsonby conveyed the manor of Inchiquin, and the lands before mentioned, situate in the county of Cork, (except the seven town lands excepted and reserved in and by the settlement of the 6th of December, 1769, and reserving also out of the grant and conveyance seven other town lands, part of the said manor lands, (that is to say) the town and lands of Kilnatoragh, Ballyvarrigheitra, Drissanmore, Drissenbeg, Mullarys, Ballycoleman, and Barnacoley East, which seven denominations of lands last mentioned it was thereby declared were not

intended to pass by any general words in the said deed contained, but were to remain subject to such uses, trusts, and purposes as might thereafter be limited and expressed respecting the same by William Brabazon Ponsonby and John Brabazon Ponsonby his son), to the use (subject to the jointure of 800*l.* of Louisa Ponsonby, and the jointure thereby provided for Lady Fanny Villiers) of William Brabazon Ponsonby for life, with remainder to John Brabazon Ponsonby for his life, with remainder (subject to an intervening term of years for raising younger children's portions) to the use of the first and other sons of John Brabazon Ponsonby, severally and successively in tail male, with similar limitations to William Ponsonby and Richard Ponsonby (now Bishop of Derry), the brothers of John Brabazon Ponsonby, and their respective sons, and with the ultimate remainder or reversion to William Brabazon Ponsonby in fee.

In Michaelmas term, 1802, a fine was levied, and a common recovery suffered, by William Brabazon Ponsonby and John Brabazon Ponsonby, of the said manor and lands, except the seven townlands which were excepted from the settlement of the 6th of December, 1769, but including the seven other townlands which were excepted in the settlement of the 20th of January, 1803; and it was by the last-mentioned settlement declared, that such fine and recovery, or any other fine or recovery to be levied and suffered of the said lands, should enure to the uses thereby declared, which as to the seven townlands last mentioned, (that is to say,) the said towns and lands of Kilnatoragh, Ballyvarrigheitra, Drissanmore, Drissenbeg, Mullarys,

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Ballycoleman, and Barnacoley East, were declared to be to such uses as William Brabazon Ponsonby and John Brabazon Ponsonby should jointly appoint.

By a subsequent indenture, bearing date the 4th of February, 1803, and which deed was executed by John Brabazon Ponsonby, but was not executed by William Brabazon Ponsonby, it was expressed that William Brabazon Ponsonby and John Brabazon Ponsonby did thereby grant, release, and confirm, the towns and lands of Kilnatoragh, Ballyvarrigheitra, Drissanmore, Drissenbeg, Mullarys, Ballycoleman, and Barnacoley East, unto Viscount Sackville and Lord Lismore and their heirs, upon trust to permit William Brabazon Ponsonby and John Brabazon Ponsonby during their lives, by sale or mortgage of the said lands, or any part thereof, to raise such sums of money as they should find necessary for their joint convenience; and in case John Brabazon Ponsonby should survive his father, upon trust to permit John Brabazon Ponsonby, by sale or mortgage of the lands, or such part thereof as should remain unsold, to raise such sums of money as he should find necessary or convenient for him to raise; and until such sale or mortgage should take place, upon trust to the use of William Brabazon Ponsonby for his life, with remainder to John Brabazon Ponsonby for life, with remainder to his first and other sons severally and successively in tail male, with such and the same remainders over as were expressed and declared of and concerning the residue of the said manor, lands, and premises, by the settlement of the 20th of January, 1803, and with the ultimate

remainder or reversion of and in the last-mentioned seven townlands, to the heirs of William Brabazon Ponsonby : and it was declared that it should be lawful for William Brabazon Ponsonby and John Brabazon Ponsonby, by any writings or writing to be by them jointly executed under their hands and seals, attested by two or more credible witnesses, and also for John Brabazon Ponsonby, in case he should survive his father, by any writing under his hand and seal, attested as aforesaid, to revoke or alter all and every or any of the uses and estates thereby limited of and in the last-mentioned several townlands, and by the same, or any other deed or deeds, to be executed by the said William Brabazon Ponsonby and John Brabazon Ponsonby jointly as aforesaid, or by John Brabazon Ponsonby alone, in case he should survive his father, to appoint other uses of and in the same townlands and premises.

William Brabazon Ponsonby, by his last will and testament, bearing date 23rd December, 1803 (executed and attested so as to pass real estates), after reciting, that by his marriage settlement a sum of 8000*l.* was provided for his younger children to be divided amongst them in such shares as he should appoint, and reciting that on the marriage of his third son Richard Ponsonby (the Respondent Richard Bishop of Derry) he had appointed 1000*l.*, part of the sum of 8000*l.*, for the younger children of the said Richard, if two 2000*l.*, if three 3000*l.*, and if four or more younger children, 4000*l.*, part of the said 8000*l.*, the testator, by his will, appointed the remaining 4000*l.* of the said sum of 8000*l.*, as also such further parts thereof as should be raised on the contin-

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gency of the said Richard not having a younger child or children, to be divided equally amongst his the said testator's younger children, namely, William Ponsonby, George Ponsonby, and Mary Elizabeth the wife of Earl Grey, and Frederic Ponsonby ; and after further reciting by his will that he was seised in fee of the towns and lands of Aghavine, Bryades, Ballymorrisheen, Coole-righfinny, Cornweagh, Gortcorkeran, Garry-james, Ballyvarigheightra, Kilnatoragh, Drissenmore, Drissenbeg, Mullarys, Ballycolmen, and Barnageetry East, situate in the county of Cork, (which were the several townlands which were excepted and reserved out of said settlements of 1796 and 1803 respectively), and also reciting that he was seised in fee of the estate of Bishop's Court, with Clarke Paddock, and of a freehold interest under the representatives of Mason Gerrard of the lands of Oughterrard, in the county of Kildare, and that he was seised in fee of an undivided moiety of an estate in the county of Londonderry, the said testator did, by his said will, devise the said several lands situate in the county of Cork to Peter Metge of Athbany in the county of Meath, Esquire, and Denis Bowes Daly, and the survivor of them, and to the heirs of such survivor, upon trust, out of the rents and profits of the said lands to pay to his wife, Louisa Lady Ponsonby, an annuity of 400*l.* in addition to the jointure provided for her by her marriage settlement, and a principal sum of 600*l.* to be paid to his said wife upon the day after his decease. He devised his estate of Bishop's Court, and the other premises before mentioned of which he was seised or possessed, situate in the county of Kildare, to his wife for

the term of her life ; and after her decease, he devised the same to his eldest son, John Brabazon Ponsonby, and his heirs, subject to the payment of a sum of 20,000*l.* to his the testator's fourth son George Ponsonby the younger, which hethereby charged on the Bishop's Court estate, with interest for the same at the rate of 5*l.* per cent. from the day of the death of his wife : he devised to his eldest son his county of Cork estate, meaning thereby the fourteen townlands in his will mentioned, subject to the incumbrances then chargeable thereon, and to the payment of all such debts as he said the testator should owe at the time of his death ; and also if his wife, Lady Louisa Ponsonby, should survive him, to pay to his son, the said George Ponsonby, 1000*l.* yearly, during the life of his wife, with power to the said George to levy and recover the same by distress or otherwise as he might be advised : he devised his estate in the county of Londonderry to his second son William Ponsonby, upon a condition in the will mentioned ; and he bequeathed to his wife during her life his plate and fixtures, and after her death he bequeathed the same to his eldest son John Brabazon Ponsonby ; and did also bequeath to his wife all his household furniture, and all such horses and carriages as he should die possessed of, and such stock as should be on his demesne of Bishop's Court at his death ; and he thereby directed that his house in Henrietta Street should be sold, and that the money arising therefrom should be applied towards payment of his said debts ; and all the residue of his property the said testator bequeathed to Peter Metge and Denis Bowes Daly, for the purpose of being sold, and the money arising

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that the Respondent William Brabazon Ponsonby, the eldest son of the Respondent the Bishop of Derry, was the first tenant in tail under the settlement of 20th January, 1803.

The bill prayed (amongst other things) that the trusts of the will of the said testator William Brabazon Lord Ponsonby might be carried into execution, and that the Respondent Lord Ponsonby might be obliged to make his election, whether he would abide by the will of his father, and permit the whole of the said fourteen townlands in the county Cork, or a competent part thereof, to be sold for payment of the debts, legacies, and annuities, charged thereon by his said father, or whether he would claim any part of the said fourteen townlands adversely to the said will; and that the Respondent Lord Ponsonby, and all persons claiming by or under him, might be for ever bound by such election as he should make by his answer to the said bill; and in case he should elect to take the reversion of the estate and lands in the county of Kildare expectant on his mother's death, that the Plaintiff's legacy of 10,000*l.* and the interest thereof might be decreed well charged on the said fourteen townlands, and that the same, and all other incumbrances charged thereon by the said testator's will, might be raised by sale of the whole or a competent part of the said fourteen townlands, and have priority to any debts or incumbrances of the Respondent Lord Ponsonby; and on the other hand, if the Respondent Lord Ponsonby should make his election to claim any part of the said several townlands adversely to his father's will, that in such case the Plaintiff's legacy of 10,000*l.* might be decreed well charged on such of the

said fourteen townlands as should appear liable to the debts and legacies of the said testator the late Lord, and that so much of the said debts and legacies as the same should not be sufficient to pay might be deemed charges upon the reversion of the said estate and lands in the county of Kildare; and that such of the said fourteen townlands as were liable to said debts and legacies might be sold for payment thereof; and in case of deficiency, that the said reversionary estate and lands in the county of Kildare, or a competent part thereof, might be sold to make up such deficiency; and that all necessary accounts for the purpose might be directed and taken, and in particular an account of the Plaintiff's said legacy of 10,000*l.*, and of the sum due to him on foot of his proportion of the said sum of 8000*l.* under the said settlement of 6th December, 1769, and that the same might be raised by sale of a part of the said estates in that settlement.

The Respondent Lord Ponsonby by his answer to the said bill admitted, that by reason of the great amount of the judgment and other debts of the said testator which affected his estate in the county of Cork, the said townlands excepted in and by the settlement of 1769 were a scanty and insufficient security for the payment of the Plaintiff's demand, and of the other charges induced thereon as aforesaid; and he admitted that he had since the testator's decease continued, and then was, in receipt of the rents of the whole of said settled estate in the county of Cork, and also of said fourteen townlands, and had so continued, being totally uninformed as to his rights and duties with regard to the said property, or a great part

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that the Respondent William Brabazon Ponsonby, the eldest son of the Respondent the Bishop of Derry, was the first tenant in tail under the settlement of 20th January, 1803.

The bill prayed (amongst other things) that the trusts of the will of the said testator William Brabazon Lord Ponsonby might be carried into execution, and that the Respondent Lord Ponsonby might be obliged to make his election, whether he would abide by the will of his father, and permit the whole of the said fourteen townlands in the county Cork, or a competent part thereof, to be sold for payment of the debts, legacies, and annuities, charged thereon by his said father, or whether he would claim any part of the said fourteen townlands adversely to the said will; and that the Respondent Lord Ponsonby, and all persons claiming by or under him, might be for ever bound by such election as he should make by his answer to the said bill; and in case he should elect to take the reversion of the estate and lands in the county of Kildare expectant on his mother's death, that the Plaintiff's legacy of 10,000*l.* and the interest thereof might be decreed well charged on the said fourteen townlands, and that the same, and all other incumbrances charged thereon by the said testator's will, might be raised by sale of the whole or a competent part of the said fourteen townlands, and have priority to any debts or incumbrances of the Respondent Lord Ponsonby; and on the other hand, if the Respondent Lord Ponsonby should make his election to claim any part of the said several townlands adversely to his father's will, that in such case the Plaintiff's legacy of 10,000*l.* might be decreed well charged on such of the

said fourteen townlands as should appear liable to the debts and legacies of the said testator the late Lord, and that so much of the said debts and legacies as the same should not be sufficient to pay might be deemed charges upon the reversion of the said estate and lands in the county of Kildare; and that such of the said fourteen townlands as were liable to said debts and legacies might be sold for payment thereof; and in case of deficiency, that the said reversionary estate and lands in the county of Kildare, or a competent part thereof, might be sold to make up such deficiency; and that all necessary accounts for the purpose might be directed and taken, and in particular an account of the Plaintiff's said legacy of 10,000*l.*, and of the sum due to him on foot of his proportion of the said sum of 8000*l.* under the said settlement of 6th December, 1769, and that the same might be raised by sale of a part of the said estates in that settlement.

The Respondent Lord Ponsonby by his answer to the said bill admitted, that by reason of the great amount of the judgment and other debts of the said testator which affected his estate in the county of Cork, the said townlands excepted in and by the settlement of 1769 were a scanty and insufficient security for the payment of the Plaintiff's demand, and of the other charges induced thereon as aforesaid; and he admitted that he had since the testator's decease continued, and then was, in receipt of the rents of the whole of said settled estate in the county of Cork, and also of said fourteen townlands, and had so continued, being totally uninformed as to his rights and duties with regard to the said property, or a great part

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thereof; but he denied that he made any such claim as in the said bill alleged with regard to said fourteen townlands, or even with regard to said seven townlands excepted out of the settlement of January, 1803, he being determined, as far as in him lay, to abide by his father's will, and carry it into effect: he did thereby (if the Court should consider him bound to make an election, in which respect he submitted himself entirely to its judgment) elect to take under the said will, preferring the reversion of the said Bishop's Court estate, and said other lands in the county Kildare expectant on his mother's decease, together with the other property devised to him by said will, to any interest he might otherwise have in the said fourteen townlands; and he thereby consented, in order to make his election the more decisive, that the said fourteen townlands, or a competent part of them, should be sold for payment of the Plaintiff's demand, and all other legacies, annuities, and debts charged thereon or otherwise affecting the same.

The cause was heard before the Lord High Chancellor of Ireland, on the 9th of March, 1814, and by the decree of that date it was (amongst other things) decreed, that the trusts of the will of the said William Brabazon Lord Ponsonby should be carried into execution; and the Respondent Lord Ponsonby having by his answer made his election to abide by the said will, and to take the reversion of the Bishop's Court estate, and lands in the county of Kildare thereby devised to him expectant on the decease of his mother, it was decreed that he, and all persons claiming by or under him, should be bound by such election; and accordingly

it was ordered that the Plaintiff's legacy of 10,000*l.*, with all interest thereof, was well charged by the said will upon the said fourteen townlands in the county of Cork; and it was referred to Mr. King, then one of the Masters of the said Court, to inquire what sum remained due to the Plaintiff on account of his said legacy, and to take an account of the incumbrances affecting the said several townlands and premises in the county of Cork prior to that legacy, and for that purpose to take an account of the debts and legacies of the said testator affecting the said estates, and the nature, particulars, and amount of them, according to their priorities, and what was due on the foot thereof respectively for principal, interest, and costs. And it was ordered that the creditors of the said testator, and all other persons having charges or incumbrances affecting the said estates prior to the Plaintiff's said legacy, should have liberty to go before the said Master to prove and ascertain their respective demands, the said Master first publishing an advertisement for that purpose; and the said Master was also to take an account of the said testator's personal estate, and an account of what was due to the several parties entitled for principal and interest on foot of the said sum of 8000*l.* charged by the settlement of 6th December, 1769, on the said settled estates in the county of Cork for younger children, and of all incumbrances prior thereto.

The said Master by his report, pursuant to the said decree, and dated the 16th of December, 1814, found the several sums mentioned in the first schedule to his report to be due on foot of the said sum of 8000*l.*, and he found the sum of 1500*l.* due to the Respondent George Ponsonby on foot

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of his said annuity of 300*l.*, and that the annuity was payable out of the said manor and lands, the settled estate in the pleadings mentioned, and prior to the said charge of 8000*l.*; and the said Master found that the several debts and legacies of the said testator thereafter specified were then incumbrances affecting the said lands according to the order and priority thereafter mentioned.

The Master then stated several debts due on judgments against the said testator, which judgment debts were set forth in the second schedule to his said report: he then found that there was due to the party represented by the Respondent the Earl of Norbury, namely, to Hector John Graham Toller, Esquire, administrator with the will annexed of Hector Graham, late of the city of Dublin, Esquire, deceased, for principal and interest on foot of several bonds executed by the said testator to the said Hector Graham, and which several bonds, with the date and amount thereof respectively, were specified in the third schedule to his said report annexed, a sum of 13,069*l.* 9*s.* 1*d.*

The Master then stated several other bond debts due from the said testator, and comprised in the said third schedule to his report; he then stated several simple contract debts due from the said testator, and set out in the fourth schedule to his report; and he then found that there was due to the Plaintiff (the Respondent Frederick Ponsonby) for principal and interest on foot of the said legacy of 10,000*l.* given to him by the said testator's will, and charged on the fourteen townlands in the pleadings mentioned, the unsettled estate of the said testator, the sum of 14,867*l.* 7*s.* 11*d.*, as stated in the fifth schedule to his said report; and

he found that no evidence had been laid before him touching the testator's personal estate or his funeral expences.

The said report was confirmed by order, dated the 13th of February, 1815, and the said cause was heard on further directions on the said report before the Master of the Rolls in Ireland on the 13th March, 1815; and by an order of that date His Honor was pleased to order (amongst other things) that the sums found due by the said report, and specified in the first schedule to such report, with interest, and the said arrears of annuity of 300*l.*, should be paid within six months, or in default that the lands comprised in the said settlement of 6th December, 1769, and therein named, should be sold as therein mentioned. And it was further ordered, that the several debts reported, and the interest of such as carried interest, should be paid within three months from that time; and in case of non-payment, that the same should be raised by sale of the said fourteen townlands in the pleadings mentioned, or a competent part thereof; and the said Master was directed to sell the same accordingly, and the said debts were to be paid out of the proceeds of such sale; and the Respondent Frederick Ponsonby was in the next place to be paid his said legacy of 10,000*l.* with interest.

On the 4th of April, 1818, the said Plaintiff (the Respondent Frederick Ponsonby) filed a supplemental bill in the said suit, stating (amongst other things) that the said fourteen townlands in the county of Cork had been set up for sale under the last stated order, and that Mr. Callaghan had been declared the purchaser thereof at the sum of 65,100*l.*, which purchase had been confirmed; and that cer-

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tain other lands therein mentioned, being part of the said settled estates comprised in the settlement of 1769 and 1803, had also been sold under said order to Mr. Callaghan for a sum of 16,000*l.*, and that such sale had been confirmed; and that various objections had been taken to the title, and amongst others, that the said testator had by a deed dated 12<sup>th</sup> of December, 1803, covenanted to charge a jointure of 400*l.* a year on the townlands of Gortcorkeran, one of the denominations excepted out of the said settlement of 1769, for Mrs. Richard Ponsonby, for which, as well as for the annuity of 1000*l.* a year given to the Respondent George Ponsonby by the said testator's will during his mother's life, the Court had made no provision; and that since the said decree was made Mr. William, afterwards Sir William Ponsonby, died on the 18<sup>th</sup> of June, 1815, leaving his wife enceinte of a son, who was since born, and named William Ponsonby, and who became entitled to the first estate tail in the said settled estates under the settlement of 1803; and that Sir William Ponsonby had by his will appointed his widow the Honourable Georgiana Lady Ponsonby and the said George Ponsonby his executors and guardians of his children; that since the decree was made the Plaintiff had discovered that between the time of his father's death and when he filed his original bill, the Respondent Lord Ponsonby had divested himself of the power of making a valid election with regard to the seven townlands in the county of Cork comprised in the deed of 4<sup>th</sup> January, 1803, without the consent of his creditors, having by indenture, bearing date the 14<sup>th</sup> July, 1807, mortgaged them for securing 8000*l.* and interest; and that he had by several

other deeds charged the said lands with several annuities amounting annually to 1405*l.*, which was very considerably beyond their value; and that the fund intended by the said testator the late Lord for the payment of the said legacy of 10,000*l.* had thus been exhausted, inasmuch as the other denominations of land in the county of Cork, charged by the testator with debts and legacies, were insufficient for that purpose; and stating the death of George Ponsonby, leaving his widow Lady Mary Ponsonby his sole executrix, and the death of William Burton, leaving his co-trustee Sackville Hamilton him surviving, and the death of Sackville Hamilton, leaving the Respondent Henry Hamilton his heir at law.

The bill prayed that if the mortgagee and annuitants under the Respondent Lord Ponsonby should refuse to release the said seven townlands from their demands, and thereby the election made by the Respondent Lord Ponsonby by his said answer should be defeated, that a competent part of the said Bishop's Court Estate, and the said other lands in Kildare, or the reversion therein devised by the said will to the Respondent Lord Ponsonby, might be sold for payment of the Plaintiff's demand.

The Respondent Lord Ponsonby, by his answer to the last stated bill, admitted having mortgaged the said seven townlands and charged them with annuities, as in such bill stated.

The cause was revived against Henry Hamilton and Georgiana Lady Ponsonby, by order dated the 21st April, 1818, and the supplemental suit was heard before the Lord Chancellor of Ireland; and by the decree therein, bearing date the 22nd of

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June, 1818, it was ordered (amongst other things) that the decree of the 13th of March, 1815, should be revived against the infant William Ponsonby, and that such decree should be confirmed in all respects, except as to the sale of the seven townlands excepted out of the settlement of the 20th January, 1803, and afterwards made the subject of the indenture of 4th February, 1803, namely, the lands of Kilnatoragh, &c., which lands, it was then admitted, were not subject to the debts and legacies of the testator. And it was ordered that the seven other townlands in the said decree mentioned, which were the fee-simple estate of the testator, namely, the lands of Aghavine, &c., should be forthwith sold for the purposes expressed by said former decree, subject as to the said townlands of Gortcorkeran to the jointure of 400*l.* a year charged thereon for the Respondent Frances the wife of the Respondent the Bishop of Derry. And the Respondent Lord Ponsonby having defeated his father's will as to the first seventown lands, and disabled himself from making any valid election with regard thereto, or to the reversion of the said Bishop's Court Estate, it was decreed, that in case the other seven townlands thereby decreed to be sold should be insufficient to pay off the whole of the debts and legacies of the said testator, sought by his said will to be charged on the said fourteen denominations, that then so much of the said debts and legacies, and the interest due thereon, as should remain unpaid after the application of the money to arise from the sale of the lands so decreed to be sold, should be charges upon the Respondent Lord Ponsonby's reversion of and in the said Bishop's Court Estate, and the other lands in Kildare ; and it was ordered that the same should be raised by

sale of that reversion, or a competent part thereof, subject to the use for life by the said will given to the testator's widow, which sale was ordered accordingly, and that any residue of the money to arise from such sale, after payment of the said debts, legacies, and costs, should be paid to the parties entitled thereto.

The seven townlands directed to be sold by the last stated order were sold accordingly, and the net purchase money applied pursuant to an order dated the 15th December, 1825, as far as it would go in payment of judgment debts reported due from the testator.

The testator's widow Lady Ponsonby (then Lady Fitzwilliam) died on the 1st September, 1824.

By an order bearing date the 6th of March, 1828, made by the Lord Chancellor of Ireland, it was referred to Mr. Connor, one of the Masters of the said court, to take an account of the debts of the said testator proved and reported, and which remained unpaid and to report the priority of such debts, and whether any and what sums remained due to the said George Ponsonby on foot of his legacy of 20,000*l.*, and the priority thereof, and out of what fund the same was payable; and it was further ordered that the Master should inquire, whether it would be necessary that the Bishop's Court estate should be sold forthwith, and before he should have made his report, and if so, it was ordered that he should proceed to a sale of that estate accordingly.

The said Mr. Connor made a separate report under the last stated order, bearing date the 29th day of November, 1828, finding that it would be necessary that the said Bishop's Court estate (which

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was inferior in value to the amount of the charges and incumbrances appearing to affect it) should be sold prior to making his report on the other matters referred to him; and by his further report under the last stated order, and bearing date the 27th of June, 1831, the said Master found that the Bishop's Court estate, was sold on the 9th of November, 1829, pursuant to his separate report, for the sum of 38,000*l.*; And he further found that there remained due to the several persons thereafter named the several sums thereafter stated on foot of the said several debts and legacies of the said testator, after the application of the purchase money of the said seven town lands sold as aforesaid, and that the several debts and legacies of the said testator thereafter specified were incumbrances affecting the residue of the estates of the said testator, according to the order and priority thereafter set forth. The Master then stated the several judgment debts, and then the several bond debts, (including 19,384*l.* 12*s.* 5*d.* due on the bonds to the Respondent the Earl of Norbury) remaining due from the said testator; and the said Master then stated, that there was due to the Appellants, as trustees under the settlement of the said George Ponsonby, the sum of 24,717*l.* 18*s.* 8*d.* on foot of the said legacy of 20,000*l.*, and that the same was a charge affecting the said Bishop's Court estate, and was next in priority after payment of the said several judgment and bond debts. The Master then stated the several simple contract debts remaining unpaid.

The Appellants, and their then co-trustee Lord Robert Spencer, (since deceased) filed objections to the last stated report, on the ground that the

said Master ought to have found that the said sum of 24,717*l.* 18*s.* 8*d.* was a charge affecting the said Bishop's Court estate prior to and in *exclusion* of the said several judgment and bond debts, for the following, amongst other reasons, viz. "That this  
 " suit is not in form or in substance a creditor's  
 " suit, but is a suit instituted by the Plaintiff, as a  
 " legatee, to raise the amount of a legacy be-  
 " queathed to him by the will of William Lord  
 " Ponsonby his father: that by the original decree  
 " made on the hearing of this cause, bearing date  
 " the 9th day of March 1814, it was decreed that  
 " the will of the said William Lord Ponsonby  
 " deceased, in the pleadings mentioned, should be  
 " established, and the trusts thereof carried into  
 " execution: that the said judgment and bond  
 " creditors have proved their debts in this cause in  
 " pursuance of the said decree, and have therefore  
 " assented thereto, and taken the benefit thereof,  
 " and of the provisions made for payment of their  
 " debts by the said will of the said William Lord  
 " Ponsonby: that by the said will all the debts of  
 " the said testator are expressly charged upon the  
 " said testator's estates in the county of Cork, con-  
 " sisting of fourteen denominations, and are not in  
 " any way charged upon the estate of Bishop's Court  
 " which is devised to the late Lady Ponsonby for  
 " her life, with remainder (subject to the said legacy  
 " of 20,000*l.*) to the defendant John Lord Ponsonby  
 " in fee. That by the supplemental decree made  
 " in this cause on the 22d day of June, 1818, it  
 " was decreed that seven of the said fourteen de-  
 " nominations of the said testator's estate in the  
 " county of Cork, should be sold for payment of his  
 " debts in pursuance of the trusts of his will, and

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“ of the directions of the said decree of the 9th  
“ of March, 1814, and the Defendant John Lord  
“ Ponsonby having, as in the said decree of the  
“ 22d June, 1818, mentioned, defeated the will of  
“ his father the said William Lord Ponsonby, as to  
“ the other seven denominations of the said Cork  
“ estate, and disabled himself from making any  
“ valid election with regard thereto, or to the rever-  
“ sion of the said Bishop’s Court estate in the  
“ pleadings mentioned, by the said will devised to  
“ him, it was decreed that if the said seven de-  
“ nominations of the Cork estate, thereby decreed  
“ to be sold, should be insufficient to pay off and  
“ satisfy the whole of the debts of the said William  
“ Lord Ponsonby, and the legacies by his will  
“ charged on the said fourteen townlands in the  
“ county of Cork, that then and in such case so  
“ much of the said debts and legacies, and the  
“ interest due upon the same respectively, as  
“ should remain unpaid, after the application of  
“ the purchase money of the said lands so decreed  
“ to be sold as aforesaid, should be and the same  
“ were thereby decreed charges and incumbrances  
“ upon the said Defendant John Lord Ponsonby’s  
“ reversion of and in the said Bishop’s Court  
“ estate, and the other lands in the pleadings men-  
“ tioned, situate in the county of Kildare, and that  
“ the same should be raised by sale of the said  
“ Defendant’s reversion in the said estate, or a  
“ competent part thereof, subject to the use for life  
“ by said will given to the said Defendant Louisa  
“ Lady Ponsonby; that the said seven town lands  
“ in the county of Cork have been sold, and the  
“ produce thereof has proved insufficient to pay off  
“ and satisfy the whole of the debts of the said

“ William Lord Ponsonby by his said will charged  
 “ thereon ; that the reversion of the said John Lord  
 “ Ponsonby, by the said decree of 22d June, 1818,  
 “ charged with the residue of the said debts and  
 “ legacies, was, at the time of pronouncing the said  
 “ decree under the trusts of the will of the said  
 “ William Lord Ponsonby, which was established,  
 “ and the trusts thereof directed to be performed  
 “ by the said decree of 9th of March, 1814, subject  
 “ to and charged with the said legacy of 20,000*l*.  
 “ and interest, and that therefore the said reversion  
 “ could only be and was only by the said decree  
 “ directed to be sold, subject to and charged with  
 “ the said sum of 20,000*l*., more especially in the  
 “ absence of the parties entitled to said legacy of  
 “ 20,000*l*.”

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The Appellants applied by motion to the Lord Chancellor of Ireland that the said Master's report of the 27th June, 1831, might be set aside, or sent back to be varied and amended in the particular complained of in the said objections, and by an order bearing date the 12th day of November 1831, his lordship ordered that such application should be refused.

By an order made in the said cause by the Master of the Rolls, on the application of the Plaintiff in the cause, and bearing date the 11th of February 1832, it was referred to the said Master Connor to report the funds in the bank of Ireland to the credit of the cause, and to allocate the same pursuant to the said report of the 26th of June, 1831 ; and the said Master by his report pursuant to such order, and bearing date the 20th of February, 1832, stated the funds then in the bank to the credit of the said cause, and that by reason of the said sale

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of the Bishop's Court estate not being completed he had not allocated the purchase money which had been paid in, but that he had, pursuant to the last stated order, allocated the residue of the said funds to the several parties and creditors entitled thereto pursuant to said decree — (being some of the judgment creditors remaining unpaid) — and by an order made by the Master of the Rolls, bearing date 5th of March, 1832, payment was ordered according to the allocation made by the last stated report.

By an order made by the Master of the Rolls, and bearing date the 5th of March, 1832, the carriage of the decree in the cause, and of the proceedings thereunder, was given to the Respondent the Earl of Norbury a reported creditor in the cause.

On the 11th of February, 1834, the Appellants presented their petition of appeal in this case praying that the House would reverse the order of the 12th of November, 1831, and declare that the sum by the report of the 27th of June, 1831, found due to the Appellants, and their deceased co-trustee, in respect of the legacy or charge of 20,000*l.* and the interest thereof, was as against all persons parties to or who have come in under and taken the benefit of the several decrees and proceedings in the causes or any of them, a charge upon the Bishop's Court estate and the other lands in the county of *Kildare* devised by the will of the testator William Brabazon Baron Ponsonby deceased, prior to the several and respective judgment debts and debts upon bond or other specialty which have been proved in the said causes, or either of them, and which remained unpaid at the date of the same

report; or that such report might be sent back to be reviewed so far as relates to the priority thereby assigned to the said legacy or charge of 20,000*l.* and the interest thereof.

For the Appellants, Mr. *Tinney* and Mr. *Lloyd*.

By the decree of the 22nd of June, 1818, if the first seven denominations thereby decreed to be sold should be insufficient to satisfy the whole of the debts of the testator, William Brabazon Ponsonby, and the legacies by his will sought to be charged on the fourteen townlands, in the county of Cork, then so much of the debts and legacies, and the interest due upon the same respectively, as should remain unpaid after the application of the purchase money of the seven denominations were thereby decreed charges and incumbrances upon the Defendant John Brabazon Ponsonby's reversion in the Bishop's Court estate and the other lands, situate in the county of Kildare; and it was further decreed that the same should be raised by a sale of the Defendant's reversion in the same estate and lands, or a competent part thereof, subject to the use for life by the will given to the Defendant Louisa Lady Ponsonby: and out of the money to arise by such sale, the residue of the debts and legacies should be paid, with interest thereon respectively, as directed by the former decree. Under the will of the testator William Brabazon Ponsonby, the legacy or sum of 20,000*l.* to which the Appellants are entitled, was a charge upon and prior in interest to the Defendant, John Brabazon Ponsonby's reversion so directed to be sold.

The order of the 6th of March, 1828, made after the death of Louisa Baroness Ponsonby, by

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which it was referred to the Master to take an account of the debts of the testator, proved, and reported in the cause, and which then remained unpaid, and that in taking such account the Master should report the order and priority of such debts and incumbrances, and particularly that he should inquire and report whether any and what sum remained due to the Defendant George Ponsonby, on foot of the legacy of sum of 20,000*l.* and the priority thereof, and out of what fund the same was payable, was founded upon, and was intended to give effect to the decree of the 22nd of June, 1818. The Master's report, in determining that debts which had been by the decree declared to be charges upon John Brabazon Ponsonby's reversion, were prior to the legacy or sum of 20,000*l.*, which was a charge prior to such reversion, was inconsistent with the decree of the 22nd of June, 1818.

The suit in which the decrees and order were made was not a suit for the general administration of the assets, real and personal, of the testator, William Brabazon Ponsonby, nor for payment of his debts, but only for the payment of such debts, as far as directed by his will, with the view and for the purpose of clearing the estate, which was charged with the Plaintiff's legacy of 10,000*l.*

By the will the Bishop's Court estate was not charged with the debts; but John Brabazon Ponsonby claiming the second seven denominations, which the will did charge with such debts, adversely to the said will, his reversionary interest in the Bishop's Court estate became chargeable, by way of substitution, with such debts, in lieu of the second seven denominations; and the decree

of the 22nd of June, 1818, and the subsequent order of the 6th of March, 1828, were respectively made for the purpose only of effectuating such substitution. Except for such purposes and to such extent, no decree could have been made for the satisfaction of the testator, William Lord Ponsonby's debts out of the Bishop's Court estate, without including the testator's personal estate, his Henrietta-street house and his Londonderry estate; but the personal estate and the Henrietta-street house have not been administered in the present suit, and the Londonderry estate is in no-wise included therein.

None of the persons entitled under the settlement of the 10th day of June, 1812, except the said Right Honourable George Ponsonby, the Honourable George Ponsonby, and Sir Thomas Staples, (who were respectively made parties in virtue of other interests,) were made parties to the said suits, and no question was raised in the pleadings or by any proceeding in the causes (except as hereby appears) as to the priority of the said legacy of 20,000*l.* over the reversionary interest of the said John Brabazon Ponsonby in the said Bishop's Court estate.

For the Respondents, Mr. *Parry*.

The lands in the county of Cork, charged by the testator's will with the payment of his debts, having proved inadequate to that purpose, the case was not taken out of the statute against fraudulent devises as regards the estate called Bishop's Court estate and the testator's other real estate in the county of Kildare. The Bishop's Court estate and the testator's other real estates in the county of Kildare devised by his will became on his decease

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applicable as real assets to the payment of his specialty debts, after payment of the testator's judgment debts, or other charges then affecting such estates. None of the proceedings in the causes were intended to prejudice the rights or interests of the testator's judgment and specialty creditors, and such creditors now remaining unpaid have not by reason of such proceedings, or in any other manner, relinquished or lost their legal right to be paid out of the testator's real estates, in preference to any charges created thereon by his will.

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*The Earl of Devon.*—This is a case of considerable importance in point of amount, but the point is a very short one ; it is an appeal from an order pronounced by the Lord Chancellor of Ireland upon an application made to him in the form of a motion to set aside or to review a finding by one of the Masters of that Court, and the single point presented to him was whether the Master had come to a right conclusion upon the inquiry which he was directed to make. The case originally was a suit for a legacy. It is not necessary for me to trouble your Lordships with any of the earlier proceedings in the cause. The duty of the Master clearly depends upon the terms of the reference made to him. He is directed to make a certain inquiry, and the only question is whether he has answered that inquiry correctly. After various proceedings the terms of the reference upon which alone the question depends are these:—“ By an “ order bearing date the 6th of March, 1828, it is “ referred to one of the Masters of the said Court, “ to take an account of the debts of the said tes-

“tator proved and reported in this cause, and  
“which still remain unpaid, and to report the  
“priority of such debts and incumbrances, and  
“particularly that he do inquire and report whe-  
“ther any and what sum remains due to George  
“Ponsonby on foot of his legacy and the priority  
“thereof, and out of what fund the same is pay-  
“able; and it was further ordered, that the Mas-  
“ter inquire whether it will be necessary that the  
“Bishop’s Court estate should be sold forthwith,  
“and before he shall have made his report.”

The Master by a separate report stated that he found it would be proper that the Bishop’s Court estate should be sold, the Bishop’s Court estate being that on which the legacy of 20,000*l.* is charged, and out of which it is to be paid. The Master having made his report, stating that he thought it right this estate should be sold, further found that there remained due to the several persons thereafter named the several sums thereinafter stated, on foot of the several debts and legacies of the said testator after the application of the purchase money produced by the sale of the denominations of the Cork estates in the order of the 6th of March, 1828, and that “other  
“parts of the estate had been previously sold in  
“part reduction of the debts, and that the several  
“debts and legacies of the testator thereafter  
“specified, are now incumbrances affecting the  
“residue of the estates of the said William Bra-  
“bazon Baron Ponsonby deceased, according to  
“the order and priority thereafter mentioned.”  
The Master then stated the several judgment debts and then the several bond debts including the legacy or sum of 20,000*l.*, and he found that

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there remained due to Lord Robert Spencer John Bouverie, and Thomas Staples as trustees under the settlement, the sum of 24,796*l.* 6*s.* 8*d.* on the footing of the said legacy of 20,000*l.* and that the said sum of 24,796*l.* 6*s.* 8*d.* was a charge affecting the said Bishop's Court estate, and was next in priority after payment of the several judgment and bond debts.

The parties entitled to that legacy who had gone in before the Master being the trustees, objected to that finding. They went before the Lord Chancellor, praying that he would set aside that report, inasmuch as the Master in their view ought to have declared that this legacy was a charge upon the estate prior to the debts, and not subsequent to the debts. The simple question therefore before the Lord Chancellor and now before this House, was whether the Master was right in declaring that the legacy was charged after the debts by judgment and by bond. My noble and learned friend\* and myself, are clearly of opinion that the Master was right in so doing. His duty depended entirely on the reference made to him. It has been argued that this was not a suit for a general administration of assets, but that there were various circumstances which showed the 20,000*l.* legacy was to be paid out of this particular estate, and that the other debts might be made effectual against other parts of the property, and ought to be made effectual against them; but it appears to us there is no principle of equity on which it can be said that the Appellants had a lien or charge on this particular estate, according to the principles of law

\* Lord Brougham.

and equity in priority of any charge that can be otherwise created. It may be, that in the further procedure of this suit or a suit of this nature, the Court may, in carrying out the views by which they are guided in administering the assets of the testator, say that the creditors who have a charge on other parts of the testator's real estates, shall be paid out of those parts of the real estate, in order that no person may be disappointed and that the legatee who has a charge only on one particular estate, shall be at liberty to have his claim satisfied out of that estate, but it appears to us that with this the Master had nothing to do. That is an equity which it may or may not be fitting to administer in a subsequent stage of the cause. The only question for the Master's consideration was which of those claims had the priority? and we think he was right in saying that the judgment and bond debts had priority before the legacy: and under these circumstances we think that the order of the Lord Chancellor is quite correct, and consequently, that this appeal must be dismissed; and we are of opinion that it must be dismissed with costs. I therefore move your Lordships that the order be affirmed, and the appeal be dismissed with costs.

Order affirmed with costs.

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## ENGLAND.

(COURT OF CHANCERY.)

JOHN HARCOURT POWELL - - *Appellant*;ANNA GRIGBY, WILLIAM HENRY } *Respondents.*  
CRAWFORD, and JOHN MOSELEY }

By indenture of marriage settlement, lands were conveyed in trust after the death of G. the husband to the use and intent that A. G. the wife should receive an annuity of 1000*l.* clear of all taxes and deductions for her jointure, and in bar of dower &c. with powers of distress and entry, and a term to secure the payment. By his will G. directed his debts to be paid and devised to his wife during her life, his mansion house park &c. at D., and directed that timber should be cut on his estates at H. &c. and sold to pay the expense of repairs, painting and glazing, which in the opinion of A. G. should at any time be required for any of the hereditaments devised to her for life, and for insurance of the premises, and he thereby confirmed the settlement made on his marriage. He gave to his nephew P. and his heirs all his real estates in England, including the lands devised to his wife, subject to her life interest and all his lands in Pennsylvania, without any incumbrance or restriction. He directed that the paintings in his house at D. should be enjoyed with the same by his wife for her life, and after her death to go with the house and subject to the payment of his debts. The manor, park, &c. at D. formed part of the premises settled and devised.

Held upon a bill filed by A. G. that she was entitled to enjoy the manor and park &c. free from all charges, and that the annuity of 1000*l.* ought to be raised and paid to her out of the remainder of the lands demised without contribution from the manor, park, &c.

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**I**N July, 1831, the Respondent Anna Grigby, filed a bill in the Court of Chancery stating the following case : —

By indentures of lease and release bearing date respectively the 28th and 29th days of December, 1826, and made between Joshua Grigby, of the first part, the Respondent Anna Grigby, by her then name of Anna Crawford, of the second part, and the Appellant and Thomas Crawford, of Haughley Park, in the said county of Suffolk, esquire, who is since deceased, of the third part. After reciting that a marriage was intended to be solemnised between the said Joshua Grigby, and the Respondent Anna Grigby, and that Joshua Grigby was desirous to make for the Respondent Anna Grigby (if she should survive him,) the provision thereafter contained, it was witnessed that in consideration of the said intended marriage, and for making a provision for the Respondent Anna Grigby, if the marriage should take effect, and she should survive the said Joshua Grigby, and for settling and assuring the hereditaments thereafter described to the uses, trusts, intents, and purposes thereafter expressed, and for the nominal consideration therein mentioned to be paid to the said Joshua Grigby by the Appellant and Thomas Crawford, the said Joshua Grigby granted and released unto the Appellant and the said Thomas Crawford, their heirs and assigns, all such part and parts as were freehold or charterhold, and not copyhold, or of customary tenure, of and in all that capital messuage, or mansion-house, in which the said Joshua Grigby then lived, with the park, lands, meadows and pasture grounds then occupied therewith by him, situate in Drinkstone or any other adjoining

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parish or place; and also of and in three other farms therein described as situate in the parishes of Drinkstone, Hessett, and Hawstead, respectively, to hold the same, with their appurtenances, unto the said Appellant and the said Thomas Crawford, their heirs and assigns; to the use of the said Joshua Grigby, his heirs and assigns, until the marriage should be solemnised, and immediately after the solemnisation thereof, to the use of the said Joshua Grigby, and his assigns, for his life, without impeachment of waste; and after his decease to the use and intent that the said Respondent Anna Grigby, and her assigns, in case she should survive the said Joshua Grigby, her then intended husband, should, from and immediately after his decease, yearly, and every year during her natural life, receive and take, by and out of the said hereditaments and premises, one annuity, yearly rent, or sum of 1000*l.* free and clear of and from all taxes and deductions whatsoever; the same annuity or yearly rent-charge to be in full of her jointure, and in lieu, bar, and satisfaction, as and for the dower and thirds at the common law which the said Respondent Anna Grigby could or might claim, challenge, or demand of, in, to, or out of all and every, or any of the manors, messuages, farms, lands, tenements, and hereditaments whatsoever, whereof he the said Joshua Grigby should be seised during the said then intended coverture; and also in bar, and in full satisfaction of all such share which the said Respondent Anna Grigby could, or might have, or claim out of, in, or to, the personal estate of the said Joshua Grigby, in case he should die intestate, by virtue of and under the statute made for the distribution of intes-

tates' effects, the said rent-charge or annual sum of 1000*l.* to be paid, and payable to the said Respondent Anna Grigby, and her assigns, at the times, and in manner, in the said indenture mentioned; with powers, in case the annuity should be in arrear, to enter and distrain, or take the rents and profits until the arrears &c. should be satisfied, and a term was also limited to trustees to secure the annuity and satisfy arrears by sale or mortgage.

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The marriage between Joshua Grigby and the Respondent, Anna Grigby, was shortly after the execution of the said recited indenture, duly solemnized.

By his will executed and attested in such manner as by law is required for rendering valid devises of real estates, and bearing date the 10th of February, 1829, Joshua Grigby devised and bequeathed as follows :—

“ I, Joshua Grigby, of Drinkstone, in Suffolk,  
 “ Esquire, make this my last will and testament,  
 “ in writing. I direct all my just debts be paid ;  
 “ I give and devise unto my wife, Anna Grigby,  
 “ and her assigns, for and during the term of her  
 “ natural life, all that my mansion-house, with the  
 “ yards, gardens, stables, coach-houses, and appur-  
 “ tenances now in my own occupation, at Drink-  
 “ stone aforesaid, and also all that my park thereto ;  
 “ and I direct that trees and timber shall be cut  
 “ down off my estates in the parishes of Hawstead,  
 “ Hesselsett, and Drinkstone, and sold to pay the  
 “ expense of any repairs, painting, or glazing,  
 “ which in the opinion of the said Anna Grigby,  
 “ shall at any time be required for any of the said  
 “ hereditaments so given and devised to her for  
 “ life ; also for the expense of insurance of the

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“ said premises from fire, which I direct shall  
“ be done, and that my nephew John Harcourt  
“ Powell (the Appellant) or his heirs, executors,  
“ or administrators shall point out, at proper times,  
“ what trees shall be felled for those purposes ; and  
“ if he or they neglect, or refuse to do so for one  
“ month after notice in writing shall be given to  
“ him or them, then the said Anna Grigby shall  
“ cause to be cut down, and sell such trees as she  
“ shall think proper for those purposes ; and I con-  
“ firm the settlement made on my marriage with  
“ my present wife. And I give and devise, and  
“ direct to be paid out of all the rest of my real  
“ estates in Suffolk, unto my sister Charlotte  
“ Grigby, during her life, 220*l.* a-year, to be paid  
“ by equal payments, the first day of January,  
“ April, July, and October, free of all charges. I  
“ direct that a yearly sum of 15*l.* be paid by the  
“ aforesaid payments, to the widow of Thomas  
“ Eaves, my bailiff, for her life, and that she be  
“ permitted to live without rent in the house she  
“ now resides. And subject to those two annuities,  
“ and other conditions above specified, I give and  
“ devise all my real estates in England, from  
“ and immediately after my death, and also all the  
“ above-mentioned hereditaments so given to my  
“ said wife for her life, and from and after her  
“ decease unto my said nephew John Harcourt  
“ Powell, his heirs and assigns for ever ; also I give  
“ and devise unto the said John Harcourt Powell  
“ and his heirs for ever, all my estate in the State  
“ of Pennsylvania, without any incumbrance or  
“ restriction whatsoever ; and I give and devise to  
“ my said nephew John Harcourt Powell, and his  
“ heirs, all and every my trust estates, messuages,

“ lands, and hereditaments, and all my mortgages  
 “ in fee, to hold the same according to the respect-  
 “ ive trusts, natures, and tenures thereof; and I  
 “ direct that all my paintings and portraits in my  
 “ house at Drinkstone, be enjoyed with the same  
 “ by my wife for life, and after her death to go  
 “ with the house, and subject to the payment of  
 “ my debts, and the expenses of carrying this my  
 “ will into effect. I give and bequeath all my  
 “ household furniture, plate, linen, china, wine,  
 “ stores, all the rest residue and remainder of my  
 “ personal estate and effects whatsoever and where-  
 “ soever, and of every kind, unto my said wife  
 “ Anna Grigby, for her own sole use and benefit.  
 “ I nominate and appoint my said wife and my  
 “ said nephew John Harcourt Powell, executrix  
 “ and executor of this my will. And I particu-  
 “ larly enjoin that I be buried in a wooden coffin  
 “ only, in my garden at Drinkstone, within twelve  
 “ feet of the wall, towards the west, and that my  
 “ body be not removed; and that if any minister  
 “ shall read the Unitarian funeral service on the  
 “ occasion, 20*l*. be presented to him; and that no  
 “ hatchment be placed on my house, or any monu-  
 “ ment or other memorial, in any church or  
 “ church-yard. In witness whereof, I have here-  
 “ unto set my hand and seal, this 10th day of  
 “ February, 1829. JOSHUA GRIGBY.”

The testator died on the 6th of March, 1829,  
 leaving the Respondent, Anna Grigby, and the  
 Appellant, his nephew, surviving; and they after-  
 wards duly proved the will of the testator, in the  
 proper Ecclesiastical Court, and became his legal  
 personal representatives.

On the death of Joshua Grigby, the Respondent,

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Anna Grigby, entered into the possession of the mansion-house, park, and appurtenances, with the paintings and portraits. Thomas Crawford, by his will bearing date on the 13th of February, 1829, appointed the Respondent, William Henry Crawford, his sole executor, who proved the will in the Prerogative Court of the Archbishop of Canterbury.

By a deed bearing date the 1st of January, 1831, and made between the Appellant and the Respondent, William Henry Crawford, of the first part; the Appellant of the second part; the Respondent, Anna Grigby, of the third part; the Respondents, John Moseley and William Henry Crawford, of the fourth part; and William Ransom, gentleman, of the fifth part; the Respondent, Anna Grigby, appointed the Respondent, William Henry Crawford, to be a Trustee of the said indenture of settlement, and of the hereditaments therein mentioned, in place of Thomas Crawford, and the Appellant as devisee of the real estate of Joshua Grigby; and the said Respondent, Anna Grigby, and the Appellant as executors of Joshua Grigby, respectively appointed the Respondent, John Moseley, to be a Trustee of the indenture of settlement, and of the hereditaments, in the place of the Appellant; and William Henry Crawford assigned and transferred, and the Appellant, as such devisee as aforesaid, granted and confirmed the hereditaments mentioned in the indenture of settlement, and comprised in the term of ninety-nine years, to William Ransom, his executors, administrators, and assigns, for the residue of the term, upon trust, forthwith to assign and transfer the same hereditaments to William Henry Crawford and John Moseley, their executors, administrators,

and assigns, for the residue of the term of ninety-nine years, upon the trusts declared thereof, by the indenture of settlement for that purpose.

By another indenture, bearing date the 14th of February, 1831, between William Ransom, of the one part, and William Henry Crawford and John Moseley, of the other part; William Ransom assigned and transferred the hereditaments to William Henry Crawford and John Moseley, their executors, administrators, and assigns, for the residue of the term of ninety-nine years, upon the trusts declared thereof by the indenture of settlement.

On the death of the testator, Joshua Grigby, the Appellant entered into the possession or receipt of the rents and profits of the messuages, farms, lands, meadows, and pasture grounds, charged by the indenture of settlement, other than the mansion-house, park, and appurtenances at Drinkstone, devised to the Respondent, Anna Grigby, for her life.

The bill then proceeded to state that by virtue of the indenture of release and settlement, the Respondent, Anna Grigby, became entitled to be paid the sum of 500*l.* on the 6th day of April, 1829, and a like sum of 500*l.* on the 11th day of October then next following, and to the like payments on every 6th day of April, and 11th day of October, during her life, and to have the same raised and paid, if necessary, out of the lands, meadows, and pasture grounds, other than the park, which at the time of the date and execution of the said indenture of release and settlement, were occupied by Joshua Grigby, with the mansion-house and park, and out of the said three

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farms situate in the said respective parishes of Drinkstone, Hessett, and Hawstead, and that no part thereof should be raised or paid out of the mansion-house or park; and the bill insisted that inasmuch as the last-mentioned hereditaments and premises produced no more than the sum of 791*l.* 8*s.* 6*d.* net per annum, or thereabouts, the Respondent, Anna Grigby, was entitled to have the difference between that sum and the sum of 1000*l.* per annum, raised by a mortgage of the said hereditaments and premises (other than the mansion-house, park, and appurtenances); the bill further stated that there was then due to the Respondent, Anna Grigby, a considerable sum of money for arrears of the jointure rent-charge, and that Charlotte Grigby died in the month of March, 1831; that all arrears of her said annuity had been paid to her during her life-time, or to her representatives since her death; that the premises devised to the Respondent, Anna Grigby, for her life, required to be repaired, painted, and glazed, and that the Appellant had declined to point out what trees should be felled for those purposes, or for raising a sufficient sum of money to keep insured from fire the premises devised to the said Respondent, Anna Grigby, for her life.

The bill prayed that it might be declared that the Respondent, Anna Grigby, was entitled to be paid the whole of the rents and profits of the lands, meadows, and pasture grounds, messuages, farms, and other lands situate in the parishes of Hawstead, Hessett, and Drinkstone other than the mansion-house, park, and appurtenances in discharge of the jointure rent-charge of 1000*l.* per annum, charged thereon by the indenture of settlement of the 29th

of December, 1826, or so much of such rents and profits as should amount to the sum of 1000*l.* per annum; and that an account might be taken of the arrears of the jointure rent-charge then due and owing to the Respondent; and that an account might also be taken of the rents and profits of the lands, meadows, and pasture grounds, messuages, farms, and other lands in the parishes of Hawstead, Hessett, and Drinkstone, possessed or received by the Appellant, or by any person or persons by his order, or for his use, since the death of the testator; and that thereout might be paid what should be found due to the Respondent, Anna Grigby, in respect of such jointure rent-charge; and that an account might be taken of the repairs, painting, and glazing required for the hereditaments and premises devised to the Respondent, Anna Grigby, for her life; and of the expense of the insurance of the same premises from fire; and that all necessary directions might be given for cutting down and felling the necessary trees for those purposes, and for selling the same, and for applying the produce of such sale; and that a receiver might be appointed of the rents and profits of the lands, meadows, and pasture grounds, messuages, farms, and other lands situate in the parishes of Hawstead, Hessett, and Drinkstone, except the mansion-house and park.

The Appellant, by his answer to the bill (among other things) stated that he was unable to set forth what were the motives which influenced Joshua Grigby to execute the indentures and will, or what he supposed would be the effect thereof, or what provision he intended or wished to make for the Respondent, Anna Grigby, save so far as the same

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might be inferred from the instruments themselves, and save only that the Appellant was convinced that Joshua Grigby did not intend that the whole of the annual sum of 1000*l.* provided for the Respondent, Anna Grigby, by the indentures, should be raised and paid exclusively out of such part of the real estates comprised in the settlement as is not by the will devised to the Respondent, Anna Grigby, for her life; and the Appellant said that he was the more confirmed in such, his belief, because Joshua Grigby resided in the mansion-house, and paid great attention to his property, all which was situate in the immediate neighbourhood of the mansion-house, and was perfectly well aware of the value and rental of all his property, that he set and received the rents of such parts thereof as were not occupied by himself, and that he farmed other parts thereof himself, and he well knew as the fact was that the rents of the estates, exclusive of the mansion-house and premises, devised to the Respondent, Anna Grigby, for life, were not nearly sufficient to pay to the Respondent, Anna Grigby, an annual sum of 1000*l.*, inasmuch as such parts thereof as were let off by Joshua Grigby at the date of the indenture of settlement of the 29th day of December, 1826, as also at the date of the will, including the copyhold parts thereof, were so let at divers gross rents annually amounting to 765*l.* or thereabouts, and the remainder thereof occupied by Joshua Grigby himself, including also the copyhold parts thereof, were, in the Appellant's judgment, worth about 267*l.* 11*s.* 6*d.* per annum, or thereabouts, from which respective sums large deductions would necessarily have to be made for land tax, repairs,

quit-rents, and other out-goings, as also the annual value of the copyhold parts thereof, not included in the indenture of settlement, and not affected thereby, and were devised by the will of Joshua Grigby to the Appellant, and the estates (exclusive as aforesaid), but including the lands occupied by Joshua Grigby, and deducting therefrom such copyhold parts as aforesaid, being then let at annual gross rents, amounting to 81*l.* 1*s.* 6*d.* or thereabouts, from which land-tax, repairs, and other outgoings, would also necessarily have to be made; and the Appellant submitted that all the property comprised in the indentures (including the mansion-house and hereditaments) devised to Respondent, Anna Grigby, for her life, ought to contribute rateably to the payment of the annuity of 1000*l.*

The Appellant, by his answer, said that he had always been ready and willing to make all reasonable payments for painting, glazing, and repairing the mansion-house, and for keeping the same insured against loss by fire; and that he had in fact regularly paid all demands which had ever been made on him for that purpose, and he was ready and willing, in case and so often as any further sums were necessary for any of the aforesaid purposes, to pay the same, or point out the timber to be felled for raising the same.

The Respondent, Anna Grigby, replied to the answer, and the cause was heard without any evidence other than the answers, before the Vice-Chancellor, on the 9th of June, 1832; and by the decree then made it was declared, that the several estates comprised in the settlement, and situate in the parishes of Hawstead, Hessett, and Drinkstone, other than and except the mansion-house

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and park, yards, garden, stables, coach-houses, and appurtenances thereunto, situate at Drinkstone aforesaid, which are by the will devised to the Respondent, Anna Grigby, for life, are liable to pay and make good the whole of the jointure rent-charge of 1000*l.* per annum to the Respondent, Anna Grigby, for her life, and the arrears due ; and that the mansion-house, park, and premises, so devised to the Respondent, Anna Grigby, for her life, are exempt from the payment of any part of the jointure rent-charge ; and it was referred to the master to take an account of the arrears of the jointure or rent-charge due to the Respondent, Anna Grigby, with the usual directions ; and it was ordered that the master should tax the costs of the suit to that time of the Respondent, Anna Grigby, and of the Respondents, William Henry Crawford and John Moseley ; and it was ordered that the Appellant should pay to the Respondent, Anna Grigby, the costs which she should so pay, together with her own costs ; and the Court reserved the consideration of further directions, and of the subsequent costs.

This decree was signed by the Lord Chancellor, and enrolled on the 30th of August, 1832.

The appeal was against this Decree.

For the Appellant, Mr. *Knight* and Mr. *Preston*.

By the settlement, the mansion-house, park, and other property devised to the Respondent, Anna Grigby, were chargeable with the rent-charge of 1000*l.*, and liable to contribute rateably, according to their value, to the payment of the rent-charge. The will of the testator has not in express terms or by necessary implication, or upon any reasonable

construction, exonerated the mansion-house, park, and other property, devised to the Respondent, Anna Grigby, from the payment of all or any part of the rent-charge.

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The decree is not to be supported, except on an assumption that the testator has created a new rent-charge of 1000*l.* differently modified, that is, chargeable only on the residue of the lands, exclusively of the mansion-house, park, &c., while if such had been the intention of the testator, he would have expressed that intention in the gift to his wife, as he in express terms has done in the gift to his sister, by fixing the rent-charge on the rest of his estates. The construction must be the same at law and in equity, since no new rent-charge was created at law; and unless there was a new rent-charge at law, the Respondent, Anna Grigby, could not, in her pleadings in support of a right to distrain, state this to be a rent-charge in any other manner or in any other form than as the rent-charge was created by the deed of settlement, and consequently she must describe the rent-charge as issuing out of the mansion-house, park, and other property devised to herself, as well as out of the residue of the property comprised in the settlement.

The clause in the will confirmatory of the settlement, will be fully satisfied by showing that the testator has declared his intention that in equity the rent-charge should be payable, notwithstanding he had devised part of the property to his widow for her life. It would be an unreasonable construction of the will, that the testator should be making an arrangement, by which the devisee of his will should not only be excluded from all

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benefit in the property during the life of his wife, but that there should be an accumulating debt from year to year during her life on the inheritance, and that charge carrying interest with the expense of a mortgage in each successive year, while the intention of the testator would be satisfied by securing to his widow an annuity of 1000*l.* for her life, with the possession, in like manner as the testator held it, of the mansion-house and the park, leaving her to contribute or forbear the receipt of a reasonable proportion of the rent-charge out of this property. This must have been the result if the mansion-house and park had been devised to any other person than the Respondent, Anna Grigby; and no rule of equity can be found to place the wife in a better condition than such other person would have been.

By the terms of the settlement, if there should be any arrear of rent-charge at the death of the widow, or even in her life-time, such arrears are under the trusts of the term of ninety-nine years, to be raised by a mortgage of the mansion-house and park, as well as of the other property.

For the Respondents, Mr. *Pemberton* and Mr. *Tinney*.

Every part of the estate is liable to the jointure. The testator devised the mansion-house and park to his wife for life, and then confirmed the settlement. The intention must have been to give to her the mansion-house and park, and to leave her her jointure. The appellant says she is to hold the mansion-house and park at a rack-rent. The gift of the mansion-house and park in effect took that part of the estate out of the security for the rent-charge. The testator could not intend that there

should be an annual valuation and apportionment of the rent between the estates and an abatement *pro tanto*. He must have expressed such an intention had he entertained it. The gifts are both from the same person to the same person, a husband to his wife. "You shall have my mansion-house and park to live in, and 1000*l.* a year."

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The decree was affirmed on the grounds alleged for the judgment in the court below. See 5 Simon's Reports, 290.

Decree affirmed.



# I N D E X.

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## **ACT OF PARLIAMENT.**

The corporation of Dublin had immemorially been seized of a water course, from which the inhabitant householders of Dublin had been supplied with water on certain payments made by them under contract or usage. By acts of parliament obtained in 1796 and 1809, powers were given to the corporation to levy rates upon the inhabitants, and raise money on the credit of the rates for the purpose of improving the supply of water.

Held — that the rates levied under the authority of the act could not be applied under a resolution or bye-law of the corporation, to discharge debts incurred, or expenditure made upon the improvements of the water course for the supply of the inhabitants before the passing of the acts, nor in compensation of services of the mayor or treasurer of the corporation, or salaries of new officers, or the increase of salaries of old officers. Held also that the costs of a former appeal, in which the corporation were respondents, might be given by the court below out of the fund of the rates, though not directed by the order made on appeal.—*Corporation of Dublin v. The Attorney-General*, p. 395.

**ACQUIESCENCE.** See PRACTICE 3.

**ADULTERY.** See JURISDICTION.

**AGREEMENT.** See PRACTICE 2.

**ANSWER.** See PLEADING, MORTGAGE 1.

**ASSETS.** See DEBTS.

**BILL.** See PLEADING.

**CAPACITY.** See LEGITIMACY.

**CATCHING BARGAIN.** See HEIR EXPECTANT.

**CHARGE.** See DEBTS.

**COPYHOLD.**

By articles of agreement on the 24th of April, 1769, re-



citing that R. M. was seized of customary lands of inheritance of the manor of Taunton Deane, &c., in consideration of an intended marriage, and of the marriage fortune or portion of G. H. &c., R. M. covenanted and agreed that he, his heir or assigns should and would surrender to the use of J. H. and J. M. their heirs, &c., the premises therein recited to be held by them, J. H. and J. M. and the survivor, &c. "Upon trust to permit R. M., his heirs and assigns to hold the premises, &c., until the marriage, and after the marriage for "R. M. for his life; and after the death of R. M. upon "trust for G. H. for her life, if she should survive "R. M.; and after the death of the survivor of the "settlor and his intended wife, that the trustees should "surrender the premises to the use of such child or "children of the marriage as the settlor should appoint "by deed or will; and in default of appointment by the "settlor, then as G. H. should by deed or will appoint; "and in default of such appointment by R. M. and G. H. "then to the use of all and every the child or children "of the body of R. M. on the body of G. H. begotten "(if more than one child) their heirs and assigns for "ever, according to the custom of the manor as tenants "in common; and if but one such child, then to the use "and behoof of such only child, his or her heirs or "assigns for ever, according to the custom of the said "manor; such surrender or surrenders of the premises "to be made at the costs and charges in all things of "such child or children who should be entitled to take "the same by virtue of the limitation; and in default of "issue of the body of R. M. &c., that should be living "at the time of the death of the survivor of them, then "upon this further condition, and upon this further "special trust and confidence, that J. H. and J. M., or "the survivor of them and his heirs or assigns should "surrender into the hands of the lord of the manor for "the time being, all and singular the premises to the use "and behoof of the *right heirs of R. M. for ever,* "according to the custom of the manor of Taunton "Deane; such surrender or surrenders to be made at "the costs and charges in all things of such person "or persons who by virtue of the last-mentioned "condition or limitation, should be entitled to take the "same."

The articles were executed and surrenders made according to the agreement, &c.

There was issue of the marriage one child only, E. M. The settlor R. M. died in 1779, by his will reciting that he had surrendered and settled the greatest part of his Taunton Deane lands to the use of his wife for life, and that he had other lands, parcel of the manor of Taunton Deane, which were not settled; and in order to make some provision for his daughter, he had surrendered his Taunton Deane lands to J. H. upon trust to perform his will, he devised to G. H. all his Taunton Deane lands (not settled on his marriage as aforesaid,) to hold according to the custom of the manor upon trust, to sell such unsettled lands, and with the purchase monies and his personal estate, to pay debts, &c., and apply the overplus for the maintenance, &c. of his daughter, &c.; and when she attained the age of 21, to pay the overplus of the trust monies to his daughter for her own use. G. his widow held the premises until the time of her death in 1819. E. M. died in 1812, having by her will devised all her lands, &c. to J. H.

R. M. had no brother who survived him. Held, upon these facts and events, that S. L., the youngest sister of R. M., who at the time of the death of G., the widow, was heiress of R. M., according to the custom of the manor, was entitled to the customary premises under the trusts of the articles of agreement.—*Bush v. Locke*, p. 1.

CONSTRUCTION. See COPYHOLD. DEVISE. MORTGAGE.

COSTS. See ACT OF PARLIAMENT.

DEBTS.

1. By a marriage settlement in consideration of the wife's fortune, and to make a suitable provision for her and her issue V. the settlor conveyed lands in trust upon the usual limitations in marriage settlements with terms for raising portions of younger children, with a proviso for *cesser* of the terms upon satisfaction, &c. It was then declared and agreed that the lands, &c. should in the first place stand and be charged with the several sums due for the portions of the brothers and sisters of V. the settlor, amounting to 15,000*l.*, and the judgments and bonds set forth in a schedule to the deed, and amounting to 12,700*l.* The deed contained the usual covenants for title, &c. In the covenant against

incumbrance were the following exceptions: "Other than and except the jointure of 700*l.* for the mother of V. the settlor, and other than and except the several sums due by judgments or bonds to the different persons in the schedule hereunto annexed, amounting to 12,700*l.*, and also other than and except the sum of 15,000*l.* (the portions due to the brothers and sisters of V. the settlor,) with all and every of which said several sums the said lands and premises are hereby charged," and except quit-rents and leases. In the covenant for further assurance there was by reference a similar exception, "except as before excepted." Some of the debts named in the schedule were debts of the settlor. The others were debts of his father. The settlor by his will directed that a judgment entered on a bond of A. B. (which was one of the bond debts of the testator, mentioned in the schedule to the settlement,) should be satisfied by his executors, the same having been paid. He died in 1828, having during his life paid off 15,000*l.* charged on the estate under his father's settlement for his younger brothers and sisters, and also some of his father's debts, and some of his own debts mentioned in the schedule, in case of his settled estates. Held, reversing the decree in the court below, that the debts enumerated in the schedule to the settlement, and such parts of the 15,000*l.* as remained unpaid, were a charge on the lands which were declared to be the primary fund for payment of those debts, that the personal estate was exonerated. — *Vandeleur v. Vandeleur*, p. 157.

2. P. by will devised his estate of B. to his eldest son I., charged with 20,000*l.*; and interest from the day of his death as a legacy, which he bequeathed to G. a younger son. His lands in C. he devised to I., subject to the incumbrances then a charge thereon, and to the payment of all such debts as he might owe at his decease, and also to pay G. 1000*l.* yearly during the life of his wife. He directed that his house at H. should be sold, and the produce applied towards the discharge of his said debts; and as to all the residue of his fortune, both real and personal, he devised and bequeathed the same in trust to be sold, and applied to the discharge of his debts, in aid of his said real estates; and he gave to his son F. 10,000*l.* charged on his lands in C.

In these lands in C. the testator had only a life estate, the remainder in fee being in I. his eldest son. In 1815, F. filed a bill in Chancery to put I. to his election. I., by his answer, elected to take under the will; it was declared that the legacy of 10,000*l.* was well charged on the lands in C., and accounts were directed of what was due for the legacy and incumbrances affecting the lands in C. prior to the legacy, and generally of the debts and legacies of the testator affecting those lands and their priorities, &c., and of the personal estate, &c. The Master accordingly found, and set forth in schedules to his report, the legacies and debts affecting the lands and their priorities, and the judgment-bond and simple contract debts, owing by the testator at his death, and what was due upon the legacy; but that no evidence as to his personal estate had been laid before him. Upon further directions, it was ordered that in default of payment the lands should be sold, and out of the produce that the judgment and other debts should be paid, and that the plaintiff should be paid what was due upon his legacy, &c.

In this stage of the proceedings, it was discovered that I. had incumbered the lands before the filing of the bill, and could make no valid election; whereupon a supplemental bill was filed, praying that if the creditors of I. would not release their demands, and by reason of the incumbrances the lands in C. could not be sold, then that the lands at B., and the reversion thereof devised to I. should be sold to satisfy the legacy. By the decree in this suit, it was ordered that other lands, the fee-simple estate of the testator should, be sold for the purposes expressed in the former decree, and if they should be insufficient to satisfy the debts and legacies, I. having defeated the will of his father, and disabled himself from making a valid election between the lands in C. and the reversion of the estate at B., that the debts and legacies, &c. should be charges on the reversion of I. in the estate at B., and that the same should be raised by the sale thereof, and a reference was made to the Master to ascertain debts and incumbrances, and priorities thereof, and particularly the legacy of 20,000*l.* to G., and the priority thereof, and out of what fund it ought to be paid.

The Master, by his report, certified that the legacy of

20,000*l.* was payable out of the lands at B., and was next in priority after the judgment debts remaining unpaid by sale of the other fee-simple estates of the testator. Objections to this report, and afterwards (according to the practice in Ireland) a motion was made to set aside the report, or that it might be sent back to be varied and amended: but the motion was refused, and that decision was affirmed on appeal. — *Bouverie v. Norbury*, p. 611.

DECREE. *See* FRAUD.

DESCENT. *See* COPYHOLD. LEGITIMACY.

DEMURRER. *See* PLEADING.

DEVISE. *See* DEBTS. WILL.

John Fetherston, H., made his will as follows: I bequeath to my nephew Edward Briscoe, 1000*l.* sterling; to my nephew Fetherston Briscoe a like sum of 1000*l.* sterling; to Cuthbert Fetherston of Ballintopher, the sum of 2000*l.* sterling, with remainder to his eldest daughter in case he shall not live to receive the same. I give devise and bequeath to my much respected kinsman William Fetherston, son of Cuthbert Fetherston of Mosstown, and to his heirs male, according to their seniority in age on their respectively attaining the age of twenty-one years, all my estates real and personal, in lands, houses, and tenements, not hereinbefore disposed of, the elder son surviving of the said William Fetherston, and the heirs male of his body lawfully begotten, always to be preferred to the second or younger son; and in case of the failure of issue male in the said William surviving him, or their dying unmarried and without lawful issue male attaining the age of twenty-one years, then to Theobald Fetherston, brother of the said William and his heirs male lawfully begotten on attaining the age of twenty-one years, the elder to be preferred to the younger; and in case of the death or failure of the issue male of the said Theobald lawfully begotten, and their not attaining the age of twenty-one years, then to my right heirs for ever. And I do hereby empower the said Theobald Fetherston, when in possession, to charge and encumber the said estates and properties as a provision for a younger child or children by him lawfully begotten, with any sum not exceeding £3000 sterling, in such proportions as he shall by deed or will direct; and for want of such direction, or in the event of any of the sons of the said Theobald Fetherston inheriting the said

estates or properties, then the said sum of £3000 to be equally divided between the said younger children, be they son or sons, daughter or daughters; and if but one younger child, then the entire sum of 3000*l.* to such only child, &c. &c.

At the time of the making of the will on the 26th of April, 1827, William Fetherston was living, and had issue male of his body two sons, Cuthbert Fetherston, the lessor of the plaintiff, his eldest son, and William Fetherston, his second son, then living.

William Fetherston, in the will named, died on the third of May, 1829, leaving Cuthbert Fetherston, his eldest son and heir at law, and William Fetherston, second and only younger son, and Anne Fetherston, his only daughter, him surviving. The testator died in June, 1829.

Upon these facts found in a special verdict, — Held, that the will gave an estate tail to William, which lapsed by his death, whereupon an estate tail vested in Theobald, the defendant in error. — *Jack v. Fetherston*, p. 237.

**DISCOVERY.** See **PLEADING**.

**DIVORCE.** See **JURISDICTION**.

**EQUITY.** See **PLEADING**. **FRAUD.** **HEIR EXPECTANT.**

**ESTATE TAIL.** See **DEVISE**.

**EVIDENCE.** See **TITHES**.

**EXONERATION.** See **DEBTS**.

**FRAUD.**

By indenture of marriage settlement in 1740, lands in Ireland were conveyed in trust for John Becher for life, remainder to his first and other sons, subject to a term of 99 years, in trust to raise by sale or mortgage 5000*l.* for younger children, in such shares as John Becher should appoint. In 1763, John Becher, upon the marriage of his daughter Jane with O'Donovan, appointed 2000*l.*, which was settled after the death of O'Donovan upon the younger children of the marriage as he should appoint.

In January, 1768, Richard, eldest son of John Becher, borrowed of Richard Wright 2300*l.*; a mortgage was made of the lands in settlement, and a recovery suffered to enure after payment of the mortgage money to such uses as John and Richard Becher should appoint, and in default, &c., to the uses of the settlement 1740. By deed executed in September, 1768, the uses were declared to John Becher for life; remain-

der to Richard Becher for life; remainder to the first and other sons of Richard, in strict settlement, with a power of revocation.

In 1769, on the marriage of Richard Becher, a term of 500 years was created to raise 5000*l.*, portions of younger children. John Becher was the eldest son of this marriage, and there were two younger children, who became entitled to the 5000*l.*

John Becher the elder died in 1778, having by his will, under the powers of the settlement of 1740, appointed 2000*l.* to his daughter Elizabeth, and 1000*l.* to his son Michael, who died, having bequeathed his share to his brother Richard, who on his second marriage settled that sum on the younger children of the marriage.

O'Donovan died in 1778, having appointed the 2000*l.* settled on his marriage among his younger children.

In 1777, Elizabeth Becher married William Evans, and in 1779 they filed a bill in the Court of Exchequer in Ireland, against Richard Becher, and John, his son, then a minor, &c., praying payment of the sum of 2000*l.*, or that the lands comprised in the term might be sold, which was decreed. In 1781, Richard Wright filed a bill in the Court of Exchequer, against Richard and John Becher and others, praying payment of the mortgage money, &c., or a foreclosure and sale, which was decreed. In 1785, the younger children of O'Donovan filed a bill in the Exchequer against John and Richard Becher and others, praying payment of the 2000*l.*, or a sale, which was decreed. Under the decrees in these causes, sales were effected, in which the lands were purchased in trust for, and conveyances made to, James Bernard. He settled the lands by deed in 1784, and died in 1790, having by his will secured the residue of his estate to his son. John Becher died in the lifetime of his father, Richard, who also died in 1825. In 1728, R. H. H., the son of John Becher, filed a bill in the Court of Chancery in Ireland, charging collusion and irregularity in the proceedings, and praying a declaration that the decrees and sales in the Court of Exchequer were fraudulently obtained; that the plaintiff might redeem on payment of the sums paid by James Bernard, or that he might be compensated out of his assets, which latter relief was ordered by the decree, and issues directed as to the value of the lands.

This decree was affirmed on appeal. *Bandon v. Becher*, p. 532.

HEIR. See DEBTS. DEVISE. WILL.

HEIR EXPECTANT.

K. a young man about twenty-four years of age, having under a settlement an annuity of 800*l.* during the joint lives of himself and his father, and a life estate in remainder, subject to his father's life estate in lands comprised in the settlement, entered into a negotiation with H., a silversmith and jeweller, to effect a loan of 5000*l.*, which H. declined, but offered to sell him goods, which was done accordingly, K. selecting plate, jewels, trinkets, &c. out of the shop of H., at the shop prices marked upon them, to the amount of 8000*l.*; to secure the repayment of which sum with interest at 5 per cent. from the date of the transaction, a mortgage was executed by K. of his life interest in remainder, with a covenant to insure his life. H. in his mortgage was described as of C. Square, Esquire, and the consideration was stated to be for a debt owing by K. to H.: as collateral security, warrants of attorney, to enter up judgment in England and Ireland, were executed, and judgments entered up accordingly. A promissory note for the amount was also signed by K., in which the consideration was stated to be goods sold and delivered. Pending the treaty K. had sold or charged his annuity to the full amount, and then had no other present income.

The goods were not delivered until about four months after the selection, to give time for registering the mortgage in Ireland.

Upon the delivery of the goods K. placed them in the hands of R., an auctioneer, to secure the repayment of 2500*l.* borrowed, with power to R. to sell by auction in default of repayment.

Before the execution of the mortgage, L., the father of K., was informed of some transactions of loan pending between his son and H., and the solicitors of L. who, on that occasion, acted as the solicitors of K., required H. to take back the goods and deliver up the securities, which H. refused to do. Thereupon a bill was filed by K., praying that the securities might be delivered up, and offering to return the goods, and in the mean time to deposit them in court. This was not done; but the



goods were sold at a public auction, under his power by R., for a sum of 3482*l.*, a small part being purchased at the sale by K. The bill was afterwards, in July, 1829, dismissed for want of prosecution. In July, 1830, another bill was filed, stating the same case as in the former bill, charging among other things that the goods were sold to K. at an exorbitant overcharge, and praying delivery of the securities on payment of the sum for which the goods were sold, with interest, or upon such other terms as the court should think just and direct. The bill also prayed an injunction to restrain negotiation of the promissory note, &c. The injunction was granted by order of the Vice-Chancellor, and upon motion to discharge this order it was upheld by the Lord Chancellor.

By evidence in the cause it appeared that L., to a certain extent, encouraged the transaction between his son and H., having employed agents to bargain with H., or in some manner to procure an assignment of the securities when obtained from his son, in order to protect the estate from further incumbrances. Whether L. was informed of the precise nature of the dealing before the securities were given, did not conclusively appear. There was no evidence that the goods were charged at exorbitant prices: on the contrary, it was proved that they were charged at the prices marked on them by tickets for general customers, and that they were fairly worth the prices so charged. Under these circumstances, the bill was dismissed, and the decree affirmed on appeal. — *King v. Hamlet* p. 575.

HUSBAND AND WIFE. See JURISDICTION.

INFANT. See PLEADING.

ISSUE. See LEGITIMACY.

JURISDICTION. See FRAUD.

In 1810, a marriage was solemnized in England between an English woman and W. a Scotchman by birth, property, and connections, but partly domiciled in England. In 1819, a deed was executed, by which they agreed to live separate; the agreement to be rescinded only by mutual consent, and on specified conditions, and a provision for the wife was charged upon the estates of the husband in Scotland. From this time they were in a state of separation, the husband living almost wholly in Scotland. The wife resided on the continent, chiefly in France.

Upon action by the husband in the court of session in Scotland, for a divorce on the ground of adultery—Held,—That the court had jurisdiction to pronounce a sentence of divorce *a vinculo matrimonii*.—*Warrender v. Warrender*, p. 89.

#### LEGITIMACY.

Upon a special verdict in an action of ejectment, the following facts were found:—William Birtwhistle being seized in his demesne as of fee of and in one undivided third part of and in the premises mentioned in the declaration, on the 12th of May, 1819, died so seized without leaving any issue of his body. All the brothers of the said William Birtwhistle had died in his life time, and they all died unmarried and without issue, except Alexander, one of the brothers of the said William, who married and had issue in the manner and at the time hereinafter particularly mentioned. The said Alexander Birtwhistle went from England into Scotland in the year 1790, and became and was domiciled there, and there remained and dwelt so domiciled until the time of his death, as hereinafter mentioned. One Mary Purdie was also a person dwelling and remaining in Scotland, domiciled there during the whole of the period of the time in which Alexander Birtwhistle was so domiciled there as aforesaid. Alexander Birtwhistle and Mary Purdie being so domiciled in Scotland, the said Alexander Birtwhistle did cohabit with the said Mary Purdie and did beget upon the said Mary Purdie (the Plaintiff) John Birtwhistle, which said John Birtwhistle was the only son of the said Alexander Birtwhistle, and of the said Mary Purdie, and was born in Scotland on the 15th of May, 1799. After the birth of the said John Birtwhistle, that is to say on the 6th day of May, 1805, the said Alexander Birtwhistle and Mary Purdie were married in Scotland according to the laws of Scotland. On the 5th of February, 1810, Alexander Birtwhistle, the father of the said John Birtwhistle, died in Scotland, seized to him and his heirs of divers lands, and tenements there situate, leaving the said John Birtwhistle him surviving, who after the death of his father, was duly according to the law of Scotland, served heir to the said lands and tenements of the said Alexander Birtwhistle, and now holds and enjoys the same in his own right, he the said John Birtwhistle having from the time of his birth hitherto dwelt and remained in Scotland,

goods were sold at a public auction, under his power by R., for a sum of 3482*l.*, a small part being purchased at the sale by K. The bill was afterwards, in July, 1829, dismissed for want of prosecution. In July, 1830, another bill was filed, stating the same case as in the former bill, charging among other things that the goods were sold to K. at an exorbitant overcharge, and praying delivery of the securities on payment of the sum for which the goods were sold, with interest, or upon such other terms as the court should think just and direct. The bill also prayed an injunction to restrain negotiation of the promissory note, &c. The injunction was granted by order of the Vice-Chancellor, and upon motion to discharge this order it was upheld by the Lord Chancellor.

By evidence in the cause it appeared that L., to a certain extent, encouraged the transaction between his son and H., having employed agents to bargain with H., or in some manner to procure an assignment of the securities when obtained from his son, in order to protect the estate from further incumbrances. Whether L. was informed of the precise nature of the dealing before the securities were given, did not conclusively appear. There was no evidence that the goods were charged at exorbitant prices: on the contrary, it was proved that they were charged at the prices marked on them by tickets for general customers, and that they were fairly worth the prices so charged. Under these circumstances, the bill was dismissed, and the decree affirmed on appeal. — *King v. Hamlet* p. 575.

HUSBAND AND WIFE. See JURISDICTION.

INFANT. See PLEADING.

ISSUE. See LEGITIMACY.

JURISDICTION. See FRAUD.

In 1810, a marriage was solemnized in England between an English woman and W. a Scotchman by birth, property, and connections, but partly domiciled in England. In 1819, a deed was executed, by which they agreed to live separate; the agreement to be rescinded only by mutual consent, and on specified conditions, and a provision for the wife was charged upon the estates of the husband in Scotland. From this time they were in a state of separation, the husband living almost wholly in Scotland. The wife resided on the continent, chiefly in France.

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and been domiciled there. If a marriage of the mother of a child with the father of such child takes place in Scotland, such child born in Scotland before the marriage is equally legitimate by the laws of Scotland, with children born after the marriage, for the purpose of taking land and every other purpose.

After a judgment on this verdict for the defendant, upon a writ of error in Parliament, the House of Lords proposed the following question to the Judges:—"A. went from England to Scotland, and resided, and was domiciled there, and so continued for many years till the time of his death. A. cohabited with M. an unmarried woman, during the whole period of his residence in Scotland, and had by her a son B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland according to the laws of that country. By the laws of Scotland, if the marriage of the mother of a child with the father of such child take place in Scotland, such child born in Scotland before the marriage, is equally legitimate with children born after the marriage, for the purpose of taking land and for every other purpose. A. died seized of real estate in England and intestate. Is B. entitled to such property as the heir of A.?" To this question the judges answered in the negative.

If any error or deficiency in the statements of facts appears in the special verdict, whether a venire de novo may be awarded—*Quære*.—*Doe d. Birtwhistle v. Vardill*, p. 32.

**MARRIAGE.** See LEGITIMACY.

**MORTGAGE.** See HEIR EXPECTANT.

1. In a suit by mortgagee against the mortgagor and a party claiming a charge by prior mortgage as extending over the same premises, a reference was made to the Master to enquire as to the extent and priorities of the securities claimed by the Plaintiff and Defendant respectively. The Master found that P., the mortgagor, was seized of a piece of ground called Lydes, on which a pile of buildings called Somerset Place had been erected by him, and that D. had advanced money to enable him to erect the same; that D. from time to time had advanced further sums to P.; and that by agreement in 1807, P. charged two of the houses then built, and two others of the same pile then building, with the amount of monies then owing by P. to D.

That upon an account taken in June 1808, and a memorandum signed at the foot of the account, a similar charge was made upon the premises for a balance of 2025*l.* then due to D.: that by a memorandum at the foot of an account made up to September, 1808, P. charged the premises, and likewise all and every other the messuages, lands, hereditaments, fee-farm, or ground rents in Somerset Place aforesaid, adjoining the unfinished houses, with the payment of 2425*l.* and he thereby agreed to execute to D. a mortgage of all the messuages lands, hereditaments, fee-farm or ground-rents situate in Somerset Place: that the messuages mentioned in the memorandum were erected on the piece of ground called Lydes, which comprised not only the site of the buildings called Somerset Place, but a lawn in front thereof, and the site of a messuage afterwards built called the Ivy House: that before September 1808, P. collected the water from the upper part of the close called Lydes, and brought it into a reservoir at the lower end of the lawn, which he laid out as an ornament to the buildings called Somerset Place: that the whole of the premises had in 1786 been conveyed in trust for P., subject to a fee-farm rent, and had afterwards been conveyed to and vested in mortgagees to secure 1825*l.*, which D. advanced money to discharge, and the premises in 1812 were reconveyed in trust for P.: that in order to secure the repayment of that sum, together with the other monies advanced by D., the title deeds relating to the premises had been deposited with the agents of D.: that an account of monies due from P. to D. was made up in 1813, and by a memorandum signed at the foot of the account, P. agreed to charge the four messuages called Somerset Place, and all other messuages, &c. in Somerset Place, adjoining the four messuages, &c. with payment to D. of 7768*l.*, and he agreed to execute a mortgage of all his messuages, &c. in Somerset Place, including the four messuages, &c. The Master then found that an agreement had been made by P. with persons who were building houses contiguous to Somerset Place, to supply these houses with water from the springs and reservoir on the Lydes, in consideration of certain annual rents to be paid to P., which agreement was carried into effect. The Master then found that in consideration of monies advanced and to be advanced by F. to P. he in 1815 agreed to convey to F. by way of

mortgage, a piece of ground near to Somerset House, and the messuage then building thereon, called the Ivy house, and also the water-rents reserved by the agreements before stated, which agreements had been deposited by P. in the hands of F. for such purpose. He further found that the Ivy House had been built on part of the ground called Lydes, and that the springs which supplied the water in respect of which the rents had been reserved, arose from part of such land ; but he found that the security of D. extended over the whole premises, and was the prior security. Exceptions were taken to this report, and upon argument were allowed by the Court below ; but the order allowing the exceptions was reversed upon appeal. — *Fournier v. Paine*, p. 282.

2. M. by deeds executed in 1812, conveyed lands in fee upon trust to raise money by sale or mortgage to pay off the debts of B., and to pay the surplus of monies raised in M.'s lifetime to him, and of monies raised after his death to B., the trustees to stand seized of the lands unsold in trust for M. during his life, and after his decease in trust for B. in fee.

By deeds executed in 1813, B. granted annuities to the appellant and by deeds of the same date, and to secure the annuities, gave powers of distress and entry upon the lands comprised in the deeds of 1812, and demised the lands to trustees for a term. The annuities were also further secured by warrants of attorney and judgments thereon, and memorials of them were enrolled.

By deeds executed in 1814, B. conveyed to the Respondent all the monies and premises to which he was entitled under the deeds of 1812, to secure the replacing of 20,000*l.* navy 5 per cent. lent to B. by the Respondent. M. died in 1817. Part of the lands were sold in the lifetime of M., the residue were sold after his death, and a surplus remained after the execution of the trusts. In 1819, the Respondent gave notice of his incumbrance to the surviving trustee. Upon a suit in equity, it was decreed that by the effect of the notice the Respondent had gained a priority of charge upon the fund. — *Foster v. Cockerell*, p. 332.

PARCELS. See MORTGAGE, 1.

PLEADING.

A bill for discovery and relief upon a claim of a rector for tithes being filed against an infant, an answer was put in by his guardian. The infant having attained his majority

the plaintiff filed a supplemental bill, stating the fact of the infant's having come of age, and other facts alleged to have been recently discovered, or come to the knowledge of the Plaintiff. The supplemental bill also comprised the same statement of facts as the original bill, together with some other facts not supplemental, nor alleged to have been newly discovered, and interrogatories founded upon all the statements: it prayed only a discovery. To this supplemental bill a general demurrer for want of equity was filed. The demurrer was overruled upon the ground that the Plaintiff was entitled to a discovery as to all the matters in the supplemental bill which were comprised in the original bill, and not answered, and also as to matters supplemental, and those alleged to have been newly discovered; and although he was not entitled to a discovery as to matters not supplemental, nor alleged to have been newly discovered, the demurrer was bad, as covering too much. This judgment was affirmed on appeal.—*Marquis of Waterford v. Knight*, p. 307.

**PRACTICE.** See **DEBTS**, 2.

1. A receiver, in order to obtain sureties, entered into an agreement with them that A., the partner of one of the sureties, should attend upon the receipt of the rents of the estates, and that they should be paid into a bank at L. in the name of the sureties, and that all monies to be applied for the purposes of the receivership should be drawn for by checks prepared and written by A., and signed by the receiver. This agreement having been acted upon, the bank at L. failed, and a loss was sustained. The account was then transferred to another bank under the same agreement, when another loss ensued by failure of the bankers.

Held upon petition that the receiver was responsible for the amount of losses, &c.—*White v. Baugh*, p. 181.

2. A bill filed in the Exchequer stated a contract for the sale and purchase of lands of inheritance, subject to numerous life interests at nominal or conventional rents, with a proviso (among others) that in case any of the lives should drop before the completion of the contract, the increase in the value of the inheritance consequent upon the dropping of such lives, should be estimated and become proportionally an addition to the purchase money. The bill prayed a specific performance of the



contract. Upon a reference as to title, and the dropping of lives, &c. the Master by his report found the additional value of the estate by the *wearing* as well as the dropping of lives. The Plaintiffs, without prosecuting the report, presented a petition of re-hearing, the order for which having been obtained more than six months after the decree became ineffectual. They then presented a petition praying *quasi* by addition to the decree that the Master might compute the increased value from the wearing of lives, and obtained an order for that purpose; but this order was reversed upon appeal.—*Champernowne v. Brooke*, p. 196.

3. H. M., who died in December, 1815, by his will devised a term in his lands at W. in trust to pay his debts, and the legacies and annuities given by his will. He thereby gave to his mother R. M. the sum of 500*l.* and an annuity of 200*l.*, in addition to her jointure of 800*l.* a year charged upon the lands devised. He also gave to his sister A. M. an annuity of 400*l.*, upon condition that she released his estates from any charge, claim, or demand she might have thereon.

Upon a bill filed in 1816, to carry the trusts of the will into execution, R. M., by her answer, claimed her jointure of 800*l.* a year, and a sum of 300*l.*, with interest, as charged upon the lands devised under covenant by her marriage settlement. She also claimed the annuity of 200*l.*, and the sum of 500*l.*, with interest, given by the will; and all arrears of rents of the lands devised due at the death of her husband, the testator's father, which had been received by the testator. She further claimed a proportion of the value of the timber on the lands devised planted by her husband when tenant for life, under the acts for the encouraging of planting in Ireland; and, finally, she claimed under the will of her husband the residue of his personal estate.

- A. M., by her answer, set up various claims, as charges upon the lands devised, arising out of the settlement made upon the marriage of her father and mother R. M., and upon transactions with her father and brother, the testator; among which claims was an annuity of 400*l.* under an agreement alleged to have been made by the testator with the father, in consideration of his forbearing to exercise in favour of A. M. a power of appointment over 15,000*l.* charged upon the lands; and she

submitted that the condition annexed by the will of H. M. to the annuity of 400*l.* thereby given to her was inequitable, and that she ought not to be put to any election until her rights against the estate of H. M. were ascertained.

R. M. died in 1818, having by will given the residue of all her property to A. M., who was appointed executrix, and proved the will. Under the decree made in the cause in 1818, A. M. carried in a charge, by which she claimed as representative of R. M. an apportionment of the annuity of 800*l.* under settlement, and of 200*l.*, and the legacy of 500*l.* under the will of H. M.; and in her own right she claimed the arrears of the annuity of 400*l.* under the will of H. M.; and she thereby offered to release the estate of H. M. from every other charge, claim, or demand whatsoever, which she might have thereon.

The Master by his report found that A. M. was entitled, as executrix of R. M., and in her own right, according to the charge; and a decree was made for sale of the lands comprised in the term, to satisfy the charges. This decree was made in 1831. A. M. died in 1830, having received all arrears of the annuities claimed under the will in her own right, and as due to R. M., and also interest upon the legacy of 500*l.* given to R. M. under the will of H. M.

Upon a second suit against the trustees of the inheritance, representing that it would be more for the benefit of the parties interested that the fee-simple should be sold instead of the term, it was accordingly directed by a decree, which was enrolled in 1832, and proceedings were taken for the sale. In 1834 a motion was made in both causes before the Master of the Rolls by M. M., the administrator *de bonis non* of R. M., for leave to go before the Master in the first cause, and prove the several unproved demands made by and in the answer of R. M., but omitted in the charge of A. M., or to file a supplemental or other bill to establish such demand. This motion having been refused, a new motion was made before the Lord Chancellor for leave to file a supplemental or other bill to establish the unproved claims, or that such other order might be made as to the Court should seem fit. This motion being also refused,

Upon appeal to Parliament, a case was made for permission to carry in a charge and prove the claims in the original suit.

The appeal was dismissed with costs.—*Monck v. Paget*. p. 506.

**PRESUMPTION.** See **TITHES**.

**PRIORITY.** See **DEBTS**, 2. **MORTGAGE**, 1, 2.

**RECEIVER.** See **PRACTICE**, 1.

**RECTOR IMPROPRIATE.** See **TITHES**.

**REVERSION.** See **HEIR EXPECTANT**.

**SUPPLEMENTAL BILL.** See **PLEADING**.

**TRUST RESULTING.** See **WILL**.

**TITHES.**

Upon the trial of an action brought by a lay-impropriator under the statute 5 & 6 Ed. 6. c. 13., for not setting out tithe, evidence having been given that the tithe in question had never been paid for the lands of the Defendant, the judge was required to direct the jury that a grant or release, of the tithe ought to be presumed. But the judge told the jury that they could not presume a grant from mere nonpayment, and that it was no answer to a claim of tithe by a lay-impropriator. Whereupon a bill of exceptions was tendered and signed. A verdict upon this direction having been given for the Plaintiff, and judgment thereon, upon a writ of error the judgment was affirmed in the Exchequer Chamber and in the House of Lords.

From evidence of a grant from the crown in 1579, and of modern enjoyment of tithes, the jury may presume intermediate conveyances of the rectory between the date of the original grant and a lease of tithes dated in 1686.

Perception of tithe of corn is evidence of a title to tithe of hay.—*Andrews v. Drever*, p. 471.

**USURY.** See **HEIR EXPECTANT**.

**WILL.**

A. by his will gave to his wife for her life his messuage, which he held for a term of ninety-nine years, and his goods, and if she died before his estate and interest should determine, he directed that the messuage, &c. should vest in his executors, and be applicable to the purposes after declared in his will, concerning his personal estate; he devised all his lands, &c., and leasehold messuages, &c., and all other his real and personal estate, upon trust as to the real estate, to repair and let

the same, &c., and upon further trust, notwithstanding any limitation of uses or trusts thereinbefore mentioned, at their discretion to sell and convey the same, except the messuage, &c. given to his wife, &c., either in parcels for building upon, or otherwise improving the same, and upon rents for the benefit of his real estate, such rents to be held upon the same uses, &c. And as to the money to arise upon such sales upon trust, to add the same to his personal estate to constitute a part thereof. The will then as to lands, &c. at W., gave them in trust for G. H. and also 7000*l.* to be conveyed and paid respectively to G. H. at twenty-one; but if he should die under that age, he directed that the lands, &c. at W. and the 7000*l.* should sink into the residue of his real and personal estate, and go according to the disposition thereafter expressed. The will then proceeded as follows:—"And as to the rest, residue, and remainder of "my personal estate not by this my will specifically disposed of upon trust, that my trustees and the survivor, "his executors or administrators, do after payment "thereout of my just debts, &c., and all sums necessary "for the management and repairs of my real and personal estate, invest the overplus in the public funds, " &c., the resulting income or produce thereof to be "accumulated by way of compound interest until J. C. "shall arrive at the age of twenty-four years, and then "upon trust to convey assign &c. to J. C. (upon his "giving security, &c. for the regular payment of the "annuities therein before bequeathed) all the legal "estate and interest in all my freehold, copyhold, and "leasehold messuages, lands, &c., and all other my real "and personal estate and effects not thereinbefore "devised and bequeathed, &c." The testator also directed that his trustees, out of the income of his personal estate, should place J. C. at school, and give him an academical education at one of the universities of Oxford or Cambridge, and for that purpose appropriate out of the income of the testator's personal estate a sum not exceeding 800*l. per annum*, until he should attain twenty-one years of age, and afterwards 1,500*l. per annum* until he should attain the age of twenty-four, with limitation over in case J. C. should die without issue before he attained the age of twenty-four.

Held, that the benefit intended to be given to J. C. was

the produce of a mixed fund of the real and personal estate of the testator, and that the rents of the real estate, until J. C. attained twenty-four, did not result to the heir-at-law of the testator as undisposed of, but passed to J. C. as part of the fund given in trust.—*Ackers v. Phipps*, p. 430.

2. By indenture of marriage settlement, lands were conveyed in trust after the death of G., the husband, to the use and intent that A. G. the wife should receive an annuity of 1000*l.*, clear of all taxes and deductions, for her jointure, and in bar of dower, &c., with powers of distress and entry, and a term to secure the payment. By his will G. directed his debts to be paid, and devised to his wife during her life, his mansion-house, park, &c. at D., and directed that timber should be cut on his estates at H., &c. and sold to pay the expense of repairs, painting and glazing, which in the opinion of A. G. should at any time be required for any of the hereditaments devised to her for life, and for insurance of the premises, and he thereby confirmed the settlement made on his marriage. He gave to his nephew P. and his heirs all his real estates in England, including the lands devised to his wife, subject to her life interest, and all his lands in Pennsylvania, without any incumbrance or restriction. He directed that the paintings in his house at D. should be enjoyed with the same by his wife for her life, and after her death to go with the house, and subject to the payment of his debts. The manor, park, &c. at D. formed part of the premises settled and devised.

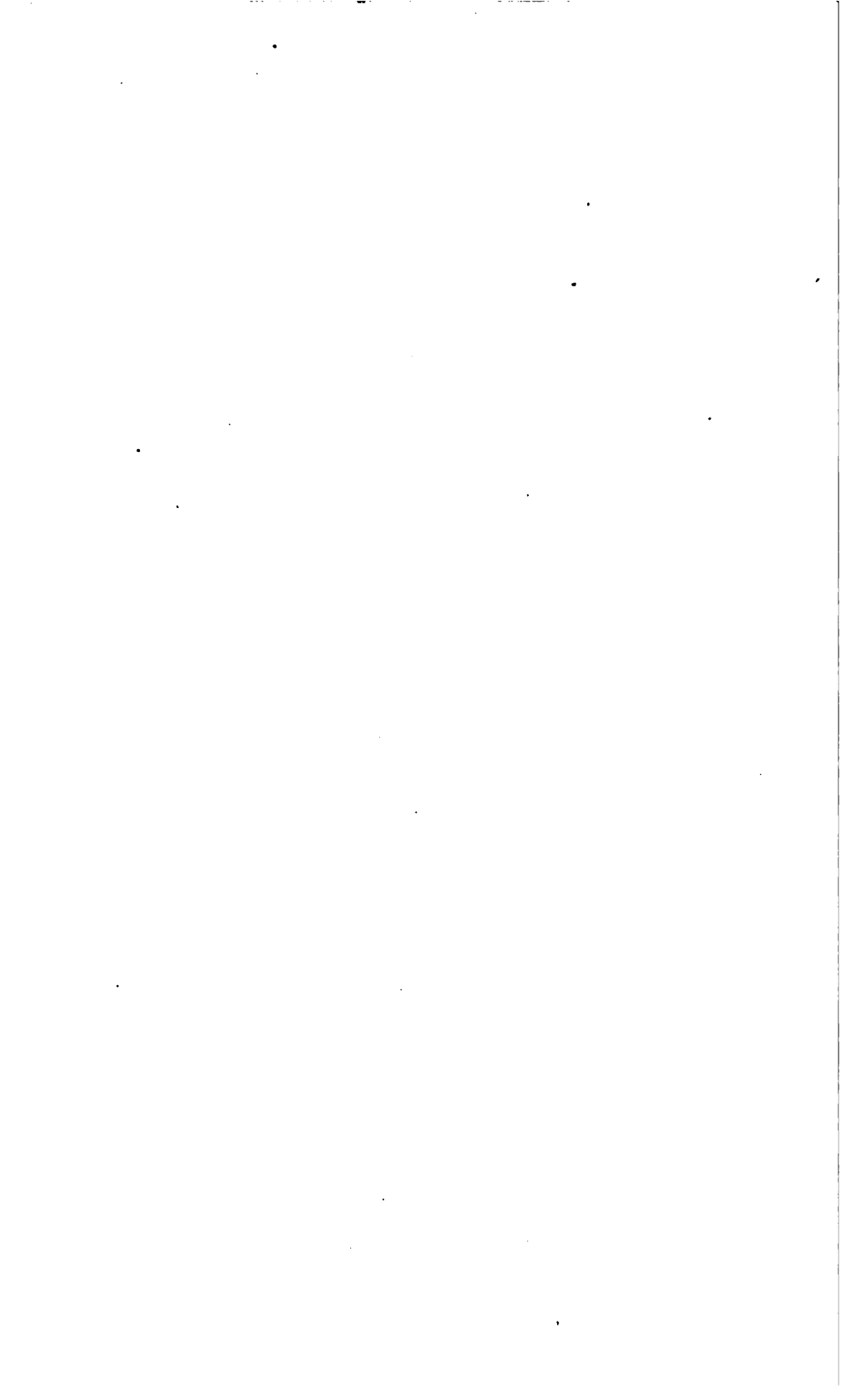
Held upon a bill filed by A. G. that she was entitled to enjoy the manor and park, &c., free from all charges, and that the annuity of 1000*l.* ought to be raised and paid to her out of the lands demised, without contribution from the manor, park, &c. *Powell v. Grigby*, p. 646.

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